

3-22-2012

Akers v. Mortensen Clerk's Record v. 1 Dckt. 39182

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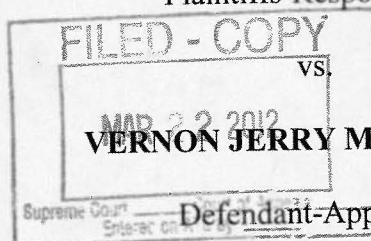
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LAW CLERK

**IN THE SUPREME COURT
OF THE STATE OF IDAHO**

**DENNIS LYLE AKERS and SHERRIE L.
AKERS, husband and wife,**

Plaintiffs-Respondents,



VERNON JERRY MORTENSEN

Defendant-Appellant,

**D.L. WHITE CONSTRUCTION, INC.; DAVID L.
WHITE and MICHELLE V. WHITE, husband and
Wife; and MARTI E. MORTENSEN,**

Defendants.

**Appealed from the District Court of the First Judicial
District of the State of Idaho, in and for the
County of Kootenai.**

**ATTORNEY FOR APPELLANT
PRO SE**

**ATTORNEY FOR RESPONDENTS
SUSAN P. WEEKS**

**ATTORNEY FOR DEFENDANTS
DUSTIN E. DEISSNER FOR MARTI MORTENSEN
ROBERT E. COVINGTON FOR WHITES**

**SUPREME COURT DOCKET #39182-2011
#39293-2011
#39493-2011**

**39182
39293
39493**

Attorneys for Defendants

ROBERT E. COVINGTON
ISB#2312
8884 N. Government Way Suite A
Hayden, ID 83835

DUSTIN E. DEISSNER
ISB#5937
1707 W. Broadway Ave
Spokane, WA 99201

Date	Code	User	Judge
1/10/2002	NEWC	GLASS	New Case Filed
		GLASS	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Owens, James & Vernon Receipt number: 0513861 Dated: 01/10/2002 Amount: \$77.00 (Check)
	SUMI	LEITZKE	Summons Issued
1/16/2002	MISC	BEVERIDG	First Amended Complaint and Demand for Jury Trial
1/29/2002	AFSV	BEVERIDG	Affidavit Of Service/Michelle V. White
	AFSV	BEVERIDG	Affidavit Of Service/D. L. White Construction, Inc.
	AFSV	BEVERIDG	Affidavit Of Service/David L. White
2/26/2002	HRSC	THORNE	Hearing Scheduled (Temporary Orders 03/15/2002 02:30 PM)
	NOHG	GLASS	Notice Of Hearing
2/27/2002	ANHR	VEITENHE	Amended Notice Of Hearing regarding plaintiffs motin for temporary restraining order
2/28/2002	ANHR	PARKER	Second Amended Notice Of Hearing Regarding Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction
3/4/2002	MOTN	VICTORIN	Motion for Temporary Restraining Order, Motion for Preliminary Injunction and Notice of Hearing
	AFFD	HILDRETH	Affidavit of Dennis Akers in Support of Plaintiffs' Motion For Temporary Restraining Order & Preliminary Injunction
3/5/2002	AFFD	SMITH	Affidavit of Leander L. James in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction
3/11/2002		JANUSCH	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Liesche, Reagan Receipt number: 0519847 Dated: 03/11/2002 Amount: \$47.00 (Check)
		JANUSCH	Filing: J8B - Special Motions Counterclaim With Prior Appearance Paid by: Liesche, Reagan Receipt number: 0519848 Dated: 03/11/2002 Amount: \$8.00 (Check)
	AFFD	JANUSCH	Affidavit of David L White in Supt of Motion
	MOTN	JANUSCH	Motion for Temporary Restraining Order
	INHD	THORNE	Hearing result for Temporary Orders held on 03/11/2002 04:00 PM: Interim Hearing Held
3/26/2002	AFSV	BEVERIDG	Affidavit Of Service/Vernon J Mortensen
	ORDR	TAYLOR	Order Regarding Plaintiff's Motion for Temp Restraining Order and Preliminary Injunction (Denied)

Date	Code	User	Judge
3/27/2002		VEITENHE	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Vernon Mortensen Receipt number: 0521607 Dated: 03/27/2002 Amount: \$47.00 (Cash)
		VEITENHE	Filing: J8B - Special Motions Counterclaim With Prior Appearance Paid by: Vernon Mortensen Receipt number: 0521608 Dated: 03/27/2002 Amount: \$8.00 (Cash)
	MISC	SMITH	Defendants' Mortensen Request for Admissions
	MISC	SMITH	Defendants' Mortensen Interrogatories and Request for Production
4/5/2002	ANSW	GLASS	Counter-Defendant's Answer to Counter-Claimants D.L. White Construction, INC
4/8/2002	MOTN	SMITH	Plaintiffs' Motion for Additional Time to Respond to Defendants Mortensen's Requests for Admissions and Interrogatories and Requests for Production of Documents
4/10/2002	AFSV	BEVERIDG	Affidavit Of Service
4/15/2002	ANSW	SATERFIEL	Answer to First Amended Complaint and Counterclaim
	MISC	SATERFIEL	Defendant's Mortensen Interrogatories and Request for Production
	MISC	SATERFIEL	Defendants' Mortensen Request for Admissions
4/16/2002	ANSW	LEITZKE	Counter-Defendants' Answer to Counter-Claimants Vernon J. Mortensen and Marti E. Mortensen's Counterclaim and Counterclaims
5/8/2002	HRSC	THORNE	Hearing Scheduled (Motion for Temporary Orders 05/08/2002 03:00 PM)
	NOTH	VEITENHE	Notice Of Hearing
	NOHG	LEITZKE	Notice Of Hearing
	MOTN	LEITZKE	Ex Parte First Motion of Defendants' & Counter Claimants' Mortensen for Temporary Restraining Order and For Preliminary Injunction
	AFFD	LEITZKE	Affidavit of VJ Mortensen in Support of Motion for Temporary Restraining Order
	AFFD	LEITZKE	Affidavit of Vernon J Mortensen and Marti E Mortensen in Support of Motion for Temporary Restraining Order
	AFFD	LEITZKE	Affidavit of David L. White in Support of Motion for Temporary restraining Order
	AFFD	LEITZKE	Affidavit of John F. Adams Jr. in Support of Motion For Temporary Restraining Order
	AFFD	LEITZKE	Affidavit #2 of Vernon J Mortensen in Support of Motion to Restrain Akers

Date	Code	User		Judge
5/8/2002	AFFD	SMITH	Affidavit of Michael E Reagan in Support of Motion for Temporary Restraining Order	John T. Mitchell
	AFFD	SMITH	Affidavit of David L White in Support of Motion for Temporary Restraining Order	John T. Mitchell
	AFFD	SMITH	Affidavit of John F Adams Jr in Support of Motion for Temporary Restraining Order	John T. Mitchell
	AFFD	SMITH	Affidavit of Vernon J Mortensen and Marti E Mortensen in Support of Motion for Temporary Restraining Order	John T. Mitchell
	AFFD	SMITH	Affidavit of VJ Mortensen in Support of Motion for Temporary Restraining Order	John T. Mitchell
	MOTN	SMITH	Ex Parte First Motion of Defendants' & Counter Claimants' Mortensen for Temporary Restraining Order and for Preliminary Injunction	John T. Mitchell
	MOTN	SMITH	Ex Parte Second Motion for Temporary Restraining Order and for Preliminary Injunction	John T. Mitchell
	FILE	LEITZKE	New File Created ***** #2 *****	John T. Mitchell
	AFFD	THORNE	Affidavit of Sherrie Akers in Opposition to Defendants' Motion For Temporary Restraining Order	John T. Mitchell
	AFFD	THORNE	Affidavit of Dennis Akers in Opposition to Defendants' Motion For Temporary Restraining Order	John T. Mitchell
	INHD	THORNE	Hearing result for Motion for Temporary Orders held on 05/08/2002 03:00 PM: Interim Hearing Held	John T. Mitchell
5/9/2002	TROI	THORNE	Temporary Restraining Order Issued	John T. Mitchell
	HRSC	THORNE	Hearing Scheduled (Motion for Summary Judgment 07/08/2002 03:30 PM)	John T. Mitchell
	HRSC	THORNE	Hearing Scheduled (Jury Trial Scheduled 08/05/2002 09:00 AM)	John T. Mitchell
	HRSC	THORNE	Hearing Scheduled (Temporary Orders 06/05/2002 03:30 PM)	John T. Mitchell
	BNDC	LEITZKE	Bond Posted - Cash (Receipt 526204 Dated 05/09/2002 for 2000.00)	John T. Mitchell
	NOTC	LEITZKE	Notice of Payment in the Amount of \$2,000.00 to the Clerk of Court Pursuant to the Court's Temporary Restraining Order of May 8, 2002	John T. Mitchell
5/13/2002	NOTD	SMITH	Notice Of Deposition of Vernon J Mortensen and Subpoena Duces Tecum	John T. Mitchell
	NOTD	SMITH	Notice Of Deposition of David L White and Subpoena Duces Tecum	John T. Mitchell
5/17/2002	NOTD	SMITH	Notice Of Deposition of Dennis Lyle Akers and Subpoena Duces Tecum	John T. Mitchell

Date	Code	User	Judge
5/17/2002	NTSV	SMITH	Defendants' Mortensen Notice Of Service Upon Plaintiffs Akers Amended Interrogatories and Request for Production
5/21/2002	NOTD	HILDRETH	First Amended Notice Of Deposition of David L White & Subpoena Duces Tecum
	NOTD	HILDRETH	First Amended Notice Of Deposition of Vernon J Mortensen & Subpoena Duces Tecum
5/24/2002	BNDC	VEITENHE	Bond Posted - Cash (Receipt 527849 Dated 05/24/2002 for 2000.00)
	NOTC	SMITH	Notice of Cancellation of Deposition of Vernon J Mortensen
	NOTC	SMITH	Notice of Cancellation of Deposition of David L White
6/5/2002	STIP	SMITH	Stipulation RE Temporary Restraining Order
	HRVC	THORNE	Hearing result for Temporary Orders held on 06/05/2002 03:30 PM: Hearing Vacated
6/12/2002	MOTN	HILDRETH	Motion For Summary Judgment
	MEMO	HILDRETH	Memorandum in Support of Motion For Summary Judgment
	AFFD	HILDRETH	Affidavit of David English
	AFFD	HILDRETH	Affidavit of Earl E Sanders
	AFFD	HILDRETH	Affidavit of Michael E Reagan
	NOTC	HILDRETH	Request For Judicial Notice
	SUBC	PARKER	Substitution Of Counsel
	AFFD	PARKER	Affidavit of V J Mortensen Support of Motion for Summary Judgment
3/14/2002	ORDR	THORNE	Order Re Temporary Restraining Order
3/17/2002	NOTD	SMITH	Second Amended Notice Of Deposition of David L White and Subpoena Duces Tecum
	NOTD	SMITH	Second Amended Notice Of Deposition of Vernon J Mortensen and Subpoena Duces Tecum
3/19/2002	NOTD	SMITH	Notice Of Deposition of Dennis L Akers
3/21/2002	NOTC	BEVERIDG	Amended Notice of Deposition of Dennis L Akers
	MOTN	BEVERIDG	Motion for Protective Order
3/24/2002	AFFD	BEVERIDG	Affidavit of Leander L James in Support of Plaintiffs' Motion for an Extension of Time to Respond to Defendants' Motion for Summary Judgment, Motion to Continue Defendants' Motion for Summary Judgment, and Motion to Strike Defendants' Motion for Summary Judgment

Date	Code	User		Judge
6/24/2002	MOTN	BEVERIDG	Motion for Expedited Hearing Re: Plaintiffs' Motion for and Extension of Time to Respond to Defendants' Motion for Summary Judgment, Motion to Continue Defendants' Motion for Summary Judgment, and Motion to Strike Defendants' Motion for Summary Judgment	John T. Mitchell
	MOTN	BEVERIDG	Plaintiffs' Motion for an Extension of time to Respond to Defendants' Motion for Summary Judgment, Motion to Continue Defendants' Motion for Summary Judgment, and Motion to Strike Defendants' Motion for Summary Judgment	John T. Mitchell
6/25/2002	HRSC	THORNE	Hearing Scheduled (Motion 06/28/2002 09:00 AM)	John T. Mitchell
	NOTC	THORNE	Notice of Hearing Re: (1) Motion For Expedited Hearing RE: Plaintiff's Motion For An Extension of Time To Respond to Defendant's Motion For Summary Judgment, Motion to Continue Defendants' Motion For Summary Judgment and Motion to Strike Defendant's Motion for Summary Judgment	John T. Mitchell
6/28/2002	HRHD	THORNE	Hearing result for Motion held on 06/28/2002 09:00 AM: Hearing Held	John T. Mitchell
	MISC	BEVERIDG	Defendant Disclosure of Expert Witnesses	John T. Mitchell
	MISC	BEVERIDG	Plaintiff's Initial Disclosure of Expert Witnesses	John T. Mitchell
7/1/2002	MISC	SMITH	Amended Disclosure of Expert Witnesses	John T. Mitchell
7/11/2002	NOTD	SMITH	Notice Of Deposition of Earl Sanders and Subpoena Duces Tecum	John T. Mitchell
7/16/2002	AFSV	WEIMER	Affidavit Of Service	John T. Mitchell
	NOTD	WEIMER	Amended Notice Of Deposition of Earl Sanders and Subpoena Duces Tecum	John T. Mitchell
	NOTC	WEIMER	Notice Of Continuing Deposition Of David L White And Subpoena Duces Tecum	John T. Mitchell
7/18/2002	NOTD	WEIMER	Notice Of Deposition Of Scott Razor	John T. Mitchell
7/24/2002	MISC	WEIMER	Plaintiffs' First Supplemental Disclosure of Expert Witnesses	John T. Mitchell
7/30/2002	NOTC	GLASS	Notice of Change of Firm	John T. Mitchell
7/31/2002	NOHG	GLASS	Notice Of Hearing	John T. Mitchell
	AFFD	GLASS	Affidavit of Authenticity and In Support of Plaintiffs' Motion for an Extension of Time to Respond to Defendants' Motion for Summary Judgment - In EXP # 3*****	John T. Mitchell
	MOTN	HILDRETH	Plaintiffs' Motion For An Extension of Time For Submission of Plaintiffs' Brief in Response to Defendants' Motion For Summary Judgment	John T. Mitchell

Date	Code	User	Judge
8/2/2002	MEMO	SMITH	Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment
8/7/2002	MOTN	HILDRETH	Plaintiffs' First Motion to Strike Materials Submitted in Support of Defendants' Motion For Summary Judgment
8/8/2002	AFSV	BEVERIDG	Affidavit Of Service
8/12/2002	MISC	THORNE	Reply To Plaintiff's Memorandum In Opposition to Defendant's Motion For Summary Judgment
	AFFD	THORNE	Second Affidavit of Michael E. Reagan
8/13/2002	HRHD	TAYLOR	Hearing result for Motion for Summary Judgment held on 08/13/2002 02:00 PM: Hearing Held
8/15/2002	FILE	ROBINSON	New File Created ***** #4 *****
8/16/2002	MEMO	THORNE	Memorandum Opinion and Order Denying Defendants' Motion For Summary Judgment
8/26/2002	WITP	BEVERIDG	Witness List - Plaintiffs
8/27/2002	PLTX	SMITH	Plaintiff's List Of Exhibits
	MISC	SMITH	Pretrial Compliance - Witness Disclosure
8/28/2002	MISC	BEVERIDG	Plaintiffs' Amended Exhibit List
8/30/2002	MISC	SMITH	Pretrial Compliance - Exhibit List
	FACT	SMITH	Pretrial Compliance - Findings Of Fact and Conclusions Of Law
	MISC	SMITH	Trial Brief
9/3/2002	NOTR	BEVERIDG	Notice Of Transcript Delivery
9/4/2002	MISC	SMITH	Plaintiffs' Trial Brief
9/5/2002	NOHG	LEITZKE	Notice Of Hearing Re: Plaintiffs' Motion for Leave to Amend Plaintiffs' First Amended Complaint to Include a Claim for an Award of Punitive Damages
	MNAM	LEITZKE	Motion For Leave To Amend Plaintiffs' First Amended Complaint to Include a Claim for an Award of Punitive Damages
	MISC	LEITZKE	Plaintiffs' Second Amended Exhibit List
	FACT	SMITH	Plaintiffs' Findings Of Fact & Conclusions Of Law
9/9/2002	MOTN	VICTORIN	Motion for Leave to Amend and Notice of Hearing
	CTST	THORNE	Court Trial Started
9/10/2002	NOTR	BEVERIDG	Notice Of Transcript Delivery
	NOTR	BEVERIDG	Notice Of Transcript Delivery
10/21/2002	CTST	THORNE	Hearing result for Court Trial Scheduled held on 10/21/2002 09:00 AM: Court Trial Started

Date	Code	User	Judge
11/1/2002	MISC	HILDRETH	Plaintiffs' Second Findings of Fact & Conclusions of Law
	MISC	HILDRETH	Amended Findings of Fact & Conclusions of Law
	ANSW	JANUSCH	Amended Answer & Counterclaim to Amended Complaint
11/4/2002	MISC	SMITH	Trial Brief and Closing Argument
11/5/2002	MOTN	HILDRETH	Plaintiffs' Motion to Strike Defendants' Trial Brief & Closing Argument
11/6/2002	MNET	SMITH	Motion For Extension Of Time for Filing Brief
	AFFD	SMITH	Affidavit of LaRayne Duthie re: Plaintiff's Motion to Strike
	AFFD	SMITH	Affidavit of Michael E Reagan re: Plaintiff's Motion to Strike
1/2/2003	FACT	HAMILTON	Findings Of Fact, Conclusions Of Law And Order
1/8/2003	MEMO	NORIEGA	Plaintiff's Memorandum of Costs
1/13/2003	AFSV	SMITH	Affidavit Of Service
	AFSV	SMITH	Amended Affidavit Of Service
1/14/2003	HRSC	THORNE	Hearing Scheduled (Motion 03/18/2003 03:30 PM)
1/16/2003	AFFD	HILDRETH	Affidavit in Support Plaintiffs' Claims For Attorney Fees
	MISC	DRAPER	New File Created ***** #5 *****
1/17/2003	MOTN	DRAPER	Defendants' Motion for IRCP 54(B) Certificate and Notice of Hearing 3-18-03 at 3:30 PM
	MOTN	DRAPER	Defendant's Motion to Disallow Plaintiffs' Costs and Att. Fees & and Notice of Hearing 3-18-03 at 3:30 PM
1/21/2003	MISC	HILDRETH	First Amended IRCP 54(e)(5) Affidavit in Support Plaintiffs' Claims For Attorney Fees (In Response to Defendants' Motion to Disallow Costs & Fees)
2/4/2003	AFFD	NORIEGA	I.R.C.P. 54(e)(3) Affidavit Of Leander L. James In Support Of Plaintiff's Claims For Attorney
2/5/2003	MISC	PARKER	Defendants' Amended Objection to Plaintiffs' Costs and Attorney Fees and Notice of Hearing
2/7/2003	NOHG	GLASS	Notice Of Hearing on Motion
	MOTN	GLASS	Motion for Modification of the Court's Scheduling Order to Allow for Discovery on Damage Issues
3/4/2003	OBJT	HILDRETH	Defendants' Objection to Plaintiffs' Motion To Modify Court's Scheduling Order
3/18/2003	HRHD	TAYLOR	Hearing result for Motion held on 03/18/2003 03:30 PM: Hearing Held

Date	Code	User	Judge
3/19/2003	MISC	NORIEGA	Supplemental Affidavit Of Leander L. James In Support Plaintiffs' Claims For Attorney Fees and In Compliance With Court Order RE: Disclosure Of Scott Razor Bills
3/26/2003	ORDR	THORNE	Orders Regarding 1) Defendants' Motion for IRCP 54(B) Certificate; 2) Plaintiffs' Motion For Modification of the Courts Scheduling Order to Allow for Discovery on Damage Issues and 3) Defendant's Motion to Disallow Plaintiffs' Costs and Attorney fees
	JDMT	THORNE	Judgment Re Costs
3/28/2003	HRSC	THORNE	Hearing Scheduled (Court Trial Scheduled 09/08/2003 09:00 AM)
	ORDR	THORNE	Supplemental Scheduling Order, Notice of Trial Setting, Pretrial Order, and Mediation Order
4/8/2003	MISC	THORNE	Amended Judgment Re: Costs
4/16/2003	HRSC	THORNE	Hearing Scheduled (Motion to Compel 05/16/2003 02:00 PM)
4/17/2003	MOTN	LEITZKE	Plaintiff's First Motion to Compel, Motion for Order Re: Payment of Scott Razor's Fees and Motion for Award of Attorney's Fees, Costs and Appropriate Sanctions
	AFFD	LEITZKE	Affidavit of Leander L. James in Support of Plaintiffs' First Motion to Compel, Motion for Order Re: Payment of Scott Razor's Fees and Motion for Award of Attorney's Fees, Costs and Appropriate Sanctions
	NOHG	LEITZKE	Notice Of Hearing Re: Plaintiffs' First Motion to Compel, Motion for Order Re: Payment of Scott Razor's Fees and Motion for Award of Attorney's Fees, Costs and Appropriate Sanctions
4/22/2003	FILE	GLASS	New File Created *****#6*****
5/1/2003	STJD	JANUSCH	Satisfaction Of Judgment Regarding Costs & Amended Judgment Re: Costs
5/14/2003	AFFD	NORIEGA	Second Affidavit of Leander L. James In support of Plaintiffs' First Motion To Compel and Motion For Award of Attorney's Fees, costs and Appropriate Sanctions
5/16/2003	HRHD	THORNE	Hearing result for Motion to Compel held on 05/16/2003 02:00 PM: Hearing Held
	NTSV	HILDRETH	Notice Of Service of Discovery Responses
	AFFD	HILDRETH	Affidavit of Michael E Reagan in Opposition to Plaintiff's First Motion To Compel, Motion For Order Re: Payment of Scott Razor's Fees, & Motion For Award of Attorneys Fees, Costs & Appropriate Sanctions

Date	Code	User		Judge
5/21/2003	ORDR	THORNE	Order Granting Plaintiff's Motion to Compel	John T. Mitchell
	MNET	NORIEGA	Motion For Extension Of Time To Comply With Court Order	John T. Mitchell
	NOTC	JANUSCH	Notice of Change of Firm Address	John T. Mitchell
5/27/2003	ORDR	THORNE	Order Granting Extensio of Time	John T. Mitchell
5/30/2003	NTSD	NORIEGA	Notice Of Service Of Discovery Responses	John T. Mitchell
6/10/2003	MISC	SMITH	Supplemental Disclosure of Expert Witnesses	John T. Mitchell
6/18/2003	AFSV	HILDRETH	Affidavit Of Service-Mailed to Michael E Reagan 06-18-03	John T. Mitchell
6/26/2003	NOTR	PARKER	Notice Of Transcript Delivery	John T. Mitchell
7/11/2003	MISC	NORIEGA	Plaintiffs' Supplemental Disclosure of Expert and Lay Witnesses	John T. Mitchell
8/19/2003	MOTN	HILDRETH	Plaintiffs' Second Motion to Compel	John T. Mitchell
	MISC	HILDRETH	Plaintiffs' Third Supplemental Disclosure of Expert & Lay Witnesses	John T. Mitchell
8/21/2003	AFIS	MARTIN-TOM	Affidavit of Michael E Reagan in Support of Motion/Application for new trial and motion to vacate trial setting	John T. Mitchell
	AFIS	MARTIN-TOM	Affidavit of Alan V Kiebert in Support of Defendants Motion for New Trial	John T. Mitchell
	MOTN	MARTIN-TOM	Motion For New Trial and Motion to Vacate Trial Setting on Damages	John T. Mitchell
8/25/2003	HRSC	THORNE	Hearing Scheduled (Motion 09/02/2003 04:00 PM)	John T. Mitchell
	PLTX	HILDRETH	Plaintiff's Third Amended List Of Exhibits	John T. Mitchell
	WITP	HILDRETH	Witness List - Plaintiff's	John T. Mitchell
	MISC	HILDRETH	Pretrial Disclosure of Witnesses	John T. Mitchell
	AFFD	HILDRETH	Supplemental Affidavit of Alan V Kiebert in Support of Defendant's Motion For New Trial	John T. Mitchell
	MISC	HILDRETH	Pretrial Disclosure of Exhibits	John T. Mitchell
8/26/2003	ANHR	SATERFIEL	Amended Notice Of Hearing	John T. Mitchell
	MOTN	SATERFIEL	Motion for Order Shortening Time and Notice of Hearing	John T. Mitchell
8/27/2003	MOTN	LEITZKE	Plaintiff's Motion for Expedited Hearing Re; Plaintiffs' Second Motion to Compel	John T. Mitchell
	NOHG	LEITZKE	Notice Of Hearing Re: Plaintiffs' Motion for Expedited Hearing Re: Plaintiffs' Second Motion to Compel	John T. Mitchell
	NOHG	LEITZKE	Notice Of Hearing Re: Plaintiffs' Second Motion to Compel	John T. Mitchell
3/28/2003	MISC	MARTIN-TOM	Plaintiffs Objection to Defendants Motion for Expedited Hearing Re: Defendants Motion for New Trial and Motion to Vacate Trial Setting	John T. Mitchell

Date	Code	User	Judge
9/2/2003	HRHD	THORNE	Hearing result for Motion held on 09/02/2003 04:00 PM: Hearing Held
	HRSC	THORNE	Hearing Scheduled (Court Trial Scheduled 12/15/2003 09:00 AM)
	MISC	NORIEGA	Plaintiffs' Fourth Amended Exhibit List
	MOTN	NORIEGA	Plaintiffs' Reply to Defendants' Motion for New Trial
	AMCO	NORIEGA	Second Amended Complaint Filed
	FILE	JANUSCH	New File Created
			*****#7*****
9/3/2003	NOHG	LEITZKE	Notice Of Hearing Re: 1) Plaintiffs' First Motion for Protective Order; and 2) Plaintiffs' Motion for Reconsideration
	MISC	LEITZKE	Plaintiffs' Fourth Supplemental Disclosure of Expert and Lay Witnesses
	MOTN	LEITZKE	Plaintiffs' Motion for Reconsideration
	MISC	LEITZKE	Plaintiffs' First Motion for Protective Order
	PLTX	NORIEGA	Plaintiffs' Fifth Amended Exhibit List
9/4/2003	PBRF	NORIEGA	Plaintiffs' Trial Brief on Damages
	PLTX	NORIEGA	Plaintiff's Amended List Of Exhibits
	DBRF	NORIEGA	Defendant's Brief Phase II - Damages
9/8/2003	HRHD	THORNE	Hearing result for Court Trial Scheduled held on 09/08/2003 09:00 AM: Hearing Held
9/9/2003	OBJT	HILDRETH	Defendants' Objection to Plaintiffs' Motion For Protective Order & Motion For Reconsideration
9/17/2003	HRSC	THORNE	Hearing Scheduled (Motion 11/06/2003 04:00 PM)
9/23/2003	NOTH	PARKER	Amended Notice Of Hearing Re: Plaintiffs' Motion for Reconsideration and Motion for Protective Order
10/3/2003	MOTN	PARKER	Motion for Leave to Amend Plaintiffs' Second Amended Complaint to Include a Claim for Sherrie Akers of Negligent Infliction of Emotional Distress
	MEMO	PARKER	Memorandum in Support of Motion for Leave to Amend Plaintiffs' Second Amended Complaint to Include a Claim for Sherrie Akers of Negligent Infliction of Emotional Distress
	NOTH	PARKER	Notice Of Hearing Re: Motion for Leave to Amend Plaintiffs' Second Amended Complaint to Include a Claim for Sherrie Akers of Negligent Infliction of Emotional Distress
11/4/2003	SUBC	GLASS	Substitution Of Counsel For Defendant's, Mortensen

Date	Code	User		Judge
11/5/2003	MOTN	MARTIN-TOM	Motion for Reconsideration of Findings of Fact, Conclusions of Law and Order Filed January 2, 2003 or Alternatively Motion to Certify Order Pursuant to I.R.C.P 54(B)	John T. Mitchell
11/6/2003	HRHD	THORNE	Hearing result for Motion held on 11/06/2003 04:00 PM: Hearing Held	John T. Mitchell
11/12/2003	NOTD	MARTIN-TOM	Notice Of Deposition Duces Tecum- Jim Meckel	John T. Mitchell
	NOTD	MARTIN-TOM	Notice Of Deposition of Alan Kiebert and Subpoena Duces Tecum	John T. Mitchell
11/17/2003	ORDR	THORNE	Order Re Plaintiff's Motion For Leave to Amend The Complaint to Include a Claim for Sherrie Akers og Negligent Infliction of Emotional Disstress, Plaintiffs' First Motion For Protective Order and Plaintiff's Motion FOr Reconsideration	John T. Mitchell
11/21/2003	MEMO	PARKER	Memorandum in Support of Motion for Reconsideration	John T. Mitchell
	AFFD	PARKER	Affidavit of Terri R Yost	John T. Mitchell
	NOTH	PARKER	Notice Of Hearing	John T. Mitchell
11/25/2003	MISC	NORIEGA	Third Amended Complaint	John T. Mitchell
	MISC	NORIEGA	Plaintiffs' Fifth Supplemental Disclosure of Expert and Lay Witnesses	John T. Mitchell
11/26/2003	AFSV	NORIEGA	Affidavit Of Service/Found/Jim Meckel/November 18, 2003	John T. Mitchell
12/5/2003	NOTC	THORNE	Notice of Delivery of Original Transcript	John T. Mitchell
12/8/2003	MISC	JANUSCH	Plaintiffs' Sixth Supplemental Disclosure of Expert & lay witnesses	John T. Mitchell
	MISC	MARTIN-TOM	Plaintiff's Response to Mortensens Motion to Reconsider	John T. Mitchell
	MISC	MARTIN-TOM	Plaintiff's Sixth Supplemental Disclosure of Expert and Lay Witnesses	John T. Mitchell
	FILE	THORNE	New File Created *****#8*****	John T. Mitchell
12/9/2003	MISC	MARTIN-TOM	Plaintiff's Supplemental Trial Brief on Damages	John T. Mitchell
12/10/2003	MOTN	MARTIN-TOM	Joinder in Defendants Mortensen's Motion for Reconsideration of Findings of Fact, Conclusions of Law and Order Filed January 2/2003	John T. Mitchell
	MISC	MARTIN-TOM	Second Supplemental Disclosure of Expert Witnesses	John T. Mitchell
	MISC	MARTIN-TOM	Plaintiff's Seventh Amended Exhibit List	John T. Mitchell
	MISC	MARTIN-TOM	Plaintiff's Witness List	John T. Mitchell
12/11/2003	DEFX	GLASS	Defendant's List Of Exhibits	John T. Mitchell
	MNLI	GLASS	Motion In Limine	John T. Mitchell
	MNLI	MARTIN-TOM	Motion In Limine	John T. Mitchell

Date	Code	User		Judge
12/11/2003	MISC	MARTIN-TOM	Defendant's Supplemental Exhibit List	John T. Mitchell
	DEFX	MARTIN-TOM	Defendant's List Of Exhibits	John T. Mitchell
12/12/2003	MEMO	MARTIN-TOM	Plaintiff's Memorandum in Opposition to Defendant's Motions in Limine	John T. Mitchell
12/15/2003	PLTX	NORIEGA	Plaintiff's Supplemental List Of Exhibits for Trial of December 16, 2003	John T. Mitchell
12/16/2003	PLTX	THORNE	Corrected Plaintiff's Supplemental List Of Exhibits For Trial Of December 16, 2003	John T. Mitchell
	CTST	THORNE	Hearing result for Court Trial Scheduled held on 12/16/2003 08:30 AM: Court Trial Started	John T. Mitchell
12/17/2003	HRSC	THORNE	Hearing Scheduled (Court Trial Scheduled 12/22/2003 08:30 AM)	John T. Mitchell
12/22/2003	HRHD	THORNE	Hearing result for Court Trial Scheduled held on 12/22/2003 08:30 AM: Hearing Held	John T. Mitchell
12/30/2003	PLTX	HILDRETH	"Corrected" Plaintiff's Supplemental List Of Exhibits For Trial of December 16, 2003	John T. Mitchell
1/13/2004	NOTR	NORIEGA	Notice Of Transcript Delivery/Deposition of James Meckel	John T. Mitchell
1/30/2004	MEMO	JANUSCH	Post Trial Memorandum	John T. Mitchell
	MISC	JANUSCH	Defendants' Proposted Finding of Fact Conculsions of Law	John T. Mitchell
	MISC	NORIEGA	Plaintiffs' Second Post-Trial Brief Addressing New Evidence	John T. Mitchell
	MISC	NORIEGA	Plaintiffs' Proposed Second Findings of Facts and Conclusions of Law RE: Damages	John T. Mitchell
	FILE	ELY	New File Created ***** #9 *****	John T. Mitchell
2/6/2004	MISC	MARTIN-TOM	Defendant's Reply to Plaintiff's Post Trial Brief and Second Proposed Findings of Fact and Conclusions of Law	John T. Mitchell
	MISC	MARTIN-TOM	Plaintiff's Response to Defendant's Post Trial Memorandum	John T. Mitchell
4/1/2004	DEOP	RICKARD	Decision Or Opinion	John T. Mitchell
	FJDE	RICKARD	Memorandum Descision And Order On Reonsideration, On New Trial Issues, And Additional Findings of Fact, Conclusions of Law Regarding Damages And Order	John T. Mitchell
	STAT	RICKARD	Case status changed: Closed	John T. Mitchell
4/12/2004	MISC	THORNE	*****File # 10 Expando***** Supreme Court 30795 Volume I and II	John T. Mitchell
4/22/2004	HRSC	THORNE	Hearing Scheduled (Motion 05/20/2004 11:00 AM)	John T. Mitchell
	STAT	THORNE	Case status changed: Closed pending clerk action	John T. Mitchell

Date	Code	User	Judge
4/23/2004	NOHG	VICTORIN	Notice Of Presentment of Judgment and Decree
5/7/2004	AFFD	NORIEGA	Amended I.R.C.P. 54(e)(3) Affidavit of Lander L James in Support of Plaintiffs' Claims for Attorney Fees
	MCAF	NORIEGA	Plaintiff's Amended Memorandum Of Costs
	AFFD	NORIEGA	Second Amended I.R.C.P. 54(e)(5) Affidavit in Support Plaintiffs' Claims for Attorney Fees
5/12/2004	MISC	SWIGART	Defendants Whites Objection to Plaintiffs Proposed Judgment and Decree
5/17/2004	NOHG	GLASS	Notice Of Hearing
	MOTN	GLASS	Motion to Disallow Costs & Attorney's Fees
	HRSC	GLASS	Hearing Scheduled (Motion 06/22/2004 04:00 PM)
	STAT	GLASS	Case status changed: Reopened
	MISC	HILDRETH	Defendants' Mortensens' Joinder With Defendants' Whites' Objection to Plaintiff's Proposed Judgment & Decree
	MOTN	HILDRETH	Joinder in Defendants Mortensen's Motion to Disallow Costs & Attorney Fees
5/20/2004	HRHD	THORNE	Hearing result for Motion held on 05/20/2004 11:00 AM: Hearing Held
	FILE	ANDERSON	New File Created ***** FILE 11 *****
5/21/2004	MISC	THORNE	Amended Findings of Fact, Conclusions of Law and Order
	LETR	GLASS	Letter to Judge
5/25/2004	JDMT	THORNE	Judgment and Decree
5/26/2004	ANHR	SATERFIEL	Amended Notice Of Hearing -- 6-30-04 @ 4:00
		LEITZKE	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Leander James Receipt number: 0609615 Dated: 05/26/2004 Amount: \$3.50 (Cash)
		LEITZKE	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Leander James Receipt number: 0609615 Dated: 05/26/2004 Amount: \$1.00 (Cash)
5/28/2004		SATERFIEL	Filing: T - Civil Appeals To The Supreme Court Paid by: Davison Receipt number: 0609914 Dated: 05/28/2004 Amount: \$9.00 (Check)
	BNDC	SATERFIEL	Bond Posted - Cash (Receipt 609915 Dated 05/28/2004 for 100.00)
	BNDC	SATERFIEL	Bond Posted - Cash (Receipt 609916 Dated 05/28/2004 for 6584.50)
	MOTN	SATERFIEL	Motion for Order Staying Execution of Judgment and Decree During Appeal

Date	Code	User	Judge
5/28/2004	NOTC	SATERFIEL	Notice of Appeal
		LEITZKE	Filing: T - Civil Appeals To The Supreme Court Paid by: Robert Covington Receipt number: 0610076 Dated: 05/28/2004 Amount: \$9.00 (Check)
	NOTC	LEITZKE	Notice of Appeal (Robert Covington obo Def's White)
6/1/2004	MISC	SATERFIEL	Clerk's Certificate of Appeal
6/2/2004	SUBC	LEITZKE	Notice of Substitution Of Counsel (Robert Covington in for Def's DL White Const. & David & Michelle White, Michael Reagan out)
6/18/2004	NOAP	SATERFIEL	Notice Of Appearance at Hearing Via Telephone
	MEMO	SATERFIEL	Memorandum in Support of Motion to Disallow Costs and Attorney's Fees
6/21/2004	AFFD	SWIGART	Supplemental Affidavit in Support Plaintiffs Claimes For Attorney Fees
	MEMO	SWIGART	Plaintiffs Supplemental Memorandum of Cost
	MEMO	SWIGART	Memorandum in Opposition to Defendants Motion to Disallow Costs and Attorneys Fees
	ORDR	PARKER	Supreme Court Order Consolidating Appeals
6/22/2004	NOHG	GLASS	Notice Of Hearing
	NOHG	GLASS	Notice Of Hearing re: Plaintiff's Motion to Shorten time
	MOTN	GLASS	Motion to Shorten Time on Plaintiff's Objection to Defendant's Motion for Order Staying Execution of Judgment & Decree During Appeal
	MISC	PARKER	Objection to Defendants' Motion for Order Staying Execution of Judgment and Decree During Appeal
6/24/2004	BNDV	PARKER	Bond Converted (Transaction number 9484556 dated 06/24/2004 amount 6,584.50)
6/30/2004	HRHD	THORNE	Hearing result for Motion held on 06/30/2004 09:00 AM: Hearing Held
7/12/2004	ORDR	JANUSCH	Order re: Motion to Disallow Costs & Attorneys' fees
	JDMT	JANUSCH	Second Judgment re: Costs & Attorney Fees
7/20/2004	SUBC	VICTORIN	Substitution Of Counsel/Terri Yost
7/28/2004	NOTC	TAYLOR	Amended Notice of Appeal
8/5/2004	RECT	PARKER	Receipt Of Transcript/Respondent
9/8/2004	MOTN	GLASS	Motion to Augment CLerk's Record on Appeal
9/9/2004	ORDR	THORNE	Order To Augmenting Clerk's Record on Appeal
9/20/2004	RECT	SWIGART	Receipt Of Transcript

Date	Code	User	Judge
10/6/2004		CADDY	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Owens, James, Vernon & Weeks Receipt number: 0626450 Dated: 10/06/2004 Amount: \$7.00 (Check)
		CADDY	Miscellaneous Payment: For Certifying The Same John T. Mitchell Additional Fee For Certificate And Seal Paid by: Owens, James, Vernon & Weeks Receipt number: 0626450 Dated: 10/06/2004 Amount: \$2.00 (Check)
10/19/2004	BNDC	VICTORIN	Bond Posted - Cash (Receipt 627965 Dated 10/19/2004 for 154048.97)
	NOTC	VICTORIN	Notice of Cash Deposit with Court
12/7/2004	BNDV	JANUSCH	Bond Converted (Transaction number 9486374 dated 12/07/2004 amount 100.00)
	BNDC	JANUSCH	Bond Posted - Cash (Receipt 633361 Dated 12/07/2004 for 317248.97)
	NOTC	JANUSCH	Notice of Posting Cash Bond with Clerk of Court
12/15/2004	STAT	JOKELA	Case status changed: closed pending clerk action
1/3/2006	OPIN	JANUSCH	Opinion Filed Supreme Court
1/6/2006	MOTN	PARKER	Motion to Release Cash Bond
1/11/2006	MNDQ	PARKER	Motion To Disqualify
1/12/2006	NOTC	VICTORIN	Notice of Firm Name Change
1/13/2006	MISC	OCONNOR	Defendants' Mortensen's Joinder With Defendants' White's Motion for Disqualification
3/7/2006	REMT	JANUSCH	Remittitur
3/9/2006	ORDR	THORNE	Order Denying Disqualification Pursuant to IRCP 40 (d)(1)(F)
3/10/2006	HRSC	THORNE	Hearing Scheduled (Status Conference 06/22/2006 04:00 PM)
		THORNE	Notice of Hearing
3/15/2006	HRSC	THORNE	Hearing Scheduled (Bond Hearing 04/19/2006 03:30 PM) Yost by phone
	NOTC	LEITZKE	Notice of Telephonic Hearing on Motion to Release Cash Bond
3/23/2006	REMT	JANUSCH	Remittitur
4/19/2006	HRHD	THORNE	Hearing result for Status Conference held on 06/22/2006 04:00 PM: Hearing Held
	GRNT	THORNE	Hearing result for Bond Hearing held on 04/19/2006 03:30 PM: Motion Granted Yost by phone
	HRSC	THORNE	Hearing Scheduled (Hearing After Appeal 06/22/2006 04:00 PM)

Date	Code	User		Judge
4/19/2006	STAT	THORNE	Case status changed: Reopened	John T. Mitchell
4/25/2006	BNDE	HAMILTON	Cash Bond Exonerated (Amount 317,248.97)	John T. Mitchell
5/10/2006	MISC	BROOK	Plaintiff's brief on remand	John T. Mitchell
5/12/2006	BNDV	ROBINSON	Bond Converted (Transaction number 9492213 dated 5/12/2006 amount 2,000.00)	John T. Mitchell
5/24/2006	BRIE	HUTCHINSON	Brief on Remand	John T. Mitchell
5/25/2006	BRIE	MO'REILLY	Reply Brief Of Defendants White	John T. Mitchell
6/1/2006	MISC	BROOK	Plaintiffs reply brief on remand	John T. Mitchell
6/19/2006	SUBC	VICTORIN	Substitution Of Counsel/Terri Yost	John T. Mitchell
6/22/2006	HRHD	THORNE	Hearing result for Hearing After Appeal held on 06/22/2006 04:00 PM: Hearing Held	John T. Mitchell
7/19/2006	HRSC	THORNE	Hearing Scheduled (Motion to Reconsider 09/13/2006 04:00 PM) Yost - Phone	John T. Mitchell
	MOTN	PARKER	Motion to Reopen Case to Make Additional Findings and Take Additional Evidence	John T. Mitchell
	MEMO	PARKER	Memorandum in Support of Motion to Reopen Case to Make Additional Findings and Take Additional Evidence	John T. Mitchell
	NOTH	PARKER	Notice Of Hearing on Motion to Make Additional Findings and Take Additional Evidence	John T. Mitchell
	FILE	OLSON	New File Created ***** file 12 *****	John T. Mitchell
9/6/2006	MISC	JSHAFFER	Plaintiff's Response to Mortensen's Motion for New Trial	John T. Mitchell
9/7/2006	ORDR	THORNE	Order On Remand	John T. Mitchell
9/13/2006	DENI	THORNE	Hearing result for Motion to Reconsider held on 09/13/2006 04:00 PM: Denied Yost	John T. Mitchell
10/6/2006	JDMT	CLAUSEN	Amended Judgment and Decree on Remand	John T. Mitchell
	STAT	CLAUSEN	Case status changed: closed pending clerk action	John T. Mitchell
	JDMT	CLAUSEN	Second Amended Judgment and Decree on Remand	John T. Mitchell
10/18/2006	AFFD	REMPFER	Affidavit of Leander L James in support of plaintiffs' claims for attorney fees on remand	John T. Mitchell
	MEMO	REMPFER	Memorandum of costs (attorney fees) on remand	John T. Mitchell
10/19/2006	MOTN	PARKER	Plaintiffs' Motion for Clarification and Reconsideration	John T. Mitchell
	MEMO	PARKER	Plaintiffs' Memorandum in Support of Motion for Clarification and Reconsideration	John T. Mitchell
10/20/2006	HRSC	THORNE	Hearing Scheduled (Motion 11/15/2006 04:00 PM) For Clarification --James	John T. Mitchell

Date	Code	User	Judge
10/20/2006		PARKER	Filing: T - Civil Appeals To The Supreme Court (\$86.00 Directly to Supreme Court Plus this amount to the District Court) Paid by: Givens Pursley Receipt number: 0718324 Dated: 10/20/2006 Amount: \$15.00 (Check)
	BNDC	PARKER	Bond Posted - Cash (Receipt 718325 Dated 10/20/2006 for 100.00)
10/26/2006	MOTN	JSHAFFER	Motion to Disallow Plaintiffs' Request for Costs and Attorneys' Fees
	MEMO	JSHAFFER	Memorandum in Support of Motion to Disallow Attorney's Fees
10/31/2006	NOHG	OLSON	Notice Of Hearing
	NOHG	OLSON	Amended Notice Of Hearing
11/1/2006	OBJT	REMPFER	Objection to and motion to disallow claimed attorney fees
11/15/2006	BNDC	JANUSCH	Bond Posted - Cash (Receipt 721549 Dated 11/15/2006 for 115.00)
	GRNT	CLAUSEN	Hearing result for Motion held on 11/15/2006 04:00 PM: Motion Granted For Clarification --James
	NOTC	VICTORIN	Notice of Appeal/Robert Covington
12/8/2006	JDMT	CLAUSEN	Third amended Judgment and Decree on Remand
12/22/2006	JDMT	CLAUSEN	Third Amended Judgment and Decree on Remand
1/4/2007	NOTC	PARKER	Amended Notice of Appeal
2/2/2007	BNDC	JANUSCH	Bond Posted - Cash (Receipt 730981 Dated 2/2/2007 for 93.51)
	BNDV	JANUSCH	Bond Converted (Transaction number 9494847 dated 2/2/2007 amount 93.51)
	MISC	REMPFER	Receipt of clerk's transcript 2 Feb 07
	RECR	PARKER	Receipt Of Clerk's Record & Reporter's Trans./Terri Yost
2/5/2007	BNDC	JANUSCH	Bond Posted - Cash (Receipt 731048 Dated 2/5/2007 for 93.51)
	BNDV	JANUSCH	Bond Converted (Transaction number 9494852 dated 2/5/2007 amount 93.51)
2/7/2007	BNDC	CROUCH	Bond Posted - Cash (Receipt 731619 Dated 2/7/2007 for 113357.78)
	BNDC	ROBINSON	Bond Posted - Cash (Receipt 9627965 Dated 2/7/2007 for 154048.97)
	NOTC	LEPIRE	Notice Of Cash Deposit With Court
2/26/2007	RECT	MCCORD	Receipt Of Clerk's Transcript

Date	Code	User	Judge
5/9/2007	ORDR	PARKER	Supreme Court Order Re: Consolidation of Cases and Suspension of Briefing Schedules: Supreme Court No 33587 & 33694
8/7/2007	BNDC	JANUSCH	Bond Posted - Cash (Receipt 756456 Dated 8/7/2007 for 317248.97)
	NOTC	JANUSCH	Notice of Posting Cash Bond with Clerk of the Court
12/7/2007	MOTN	ROBINSON	Motion To Release A Portion Of cash bond
12/14/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion 01/02/2008 01:00 PM) Release Portion of Cash Bond - Covington
	STIP	BAXLEY	Stipulation to Order Releasing Cash Bond to Defendants DL White Construction, David L White and Michelle V White
12/17/2007	NOHG	MCCOY	Notice Of Hearing
12/19/2007	NOTC	BAXLEY	Notice of Non-Opposition to Motion for Partial Release of Cash Bond
1/2/2008	STIP	VICTORIN	Stipulation to Order Releasing Cash Bond to Defendants D.L. White Construction, Inc., David L White and Michelle V White
	ORDR	CLAUSEN	Order Exonerating and Releasing Cash Bond of Defendants White
	HRVC	CLAUSEN	Hearing result for Motion held on 01/02/2008 01:00 PM: Hearing Vacated Release Portion of Cash Bond - Covington
		PARKER	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Robert E Covington Receipt number: 0776478 Dated: 1/2/2008 Amount: \$1.00 (Cash)
		PARKER	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Robert E Covington Receipt number: 0776478 Dated: 1/2/2008 Amount: \$1.00 (Cash)
	BNDV	PARKER	Bond Converted (Transaction number 9497767 dated 1/2/2008 amount 113,357.78)
1/4/2008	NOTC	ROBINSON	Notice Of Change Of Address
6/10/2008	OPIN	JANUSCH	Opinion Filed-Supreme Court
10/6/2008	NOTC	BAXLEY	Notice of Attorney Lien
10/7/2008	LETR	RICKARD	Letter From Marti Ellen Mortensen
10/28/2008	NOTC	LEU	Notice Of Substitution Of Counsel Of Record
1/26/2009	NOTC	BAXLEY	AMENDED Notice of Attorney Lien
	OPIN	RICKARD	Opinion Filed
4/25/2009	REMT	SREED	Remittitur
5/3/2009	FILE	MCCORD	New File Created *****FILE 13*****
5/4/2009	AFFD	MCCORD	Affidavit of Terri Pickens

Date	Code	User		Judge
5/4/2009	MEMS	MCCORD	Memorandum In Support Of Motion to DQ	John T. Mitchell
	MOTN	MCCORD	Motion to Disqualify	John T. Mitchell
5/6/2009	HRSC	CLAUSEN	Hearing Scheduled (Status Conference 05/21/2009 03:30 PM) RE: Motion to Disqualify	John T. Mitchell
		CLAUSEN	Notice of Hearing	John T. Mitchell
5/15/2009	MEMO	MCCORD	Memorandum in Response to Def VJ Mortensen's Motion to DQ for Cause	John T. Mitchell
5/18/2009	CERT	PARKER	Amended Certificate of Service	John T. Mitchell
5/19/2009	MOTN	COCHRAN	Defendants Motion to Strike Plaintiff's Memorandum in Response to V.J. Mortensen's Motion to Disqualify for Cause	John T. Mitchell
5/20/2009	MEMO	COCHRAN	Memorandum in response to Defendant V.J. Mortensen's motion to strike Plaintiff's response to V.J. Mortensen's motion to disqualify for cause	John T. Mitchell
	AFFD	COCHRAN	Affidavit of weeks in support of opposition to motion to strike	John T. Mitchell
	NOTC	MCCORD	2nd Amended Notice of Atty Lien	John T. Mitchell
	AFIS	MCCORD	Affidavit in Support of Motion to Withdrawn	John T. Mitchell
	MOTN	MCCORD	Motion for Partial Release of Bond to Satisfy Atty Fees Lien	John T. Mitchell
	MNWD	MCCORD	Motion For Leave To Withdraw As Attorney - Terri Pickens	John T. Mitchell
5/21/2009	HRVC	JOKELA	Hearing result for Status Conference held on 05/21/2009 03:30 PM: Hearing Vacated RE: Motion to Disqualify Terry Pickens to appear by phone - FROM PICKENS LAW OFFICE - 9:21 AM	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Status Conference 05/21/2009 03:30 PM) RE: Motion to Disqualify - Set by Judge Mitchell	John T. Mitchell
	INHD	JOKELA	Hearing result for Status Conference held on 05/21/2009 03:30 PM: Interim Hearing Held RE: Motion to Disqualify - Set by Judge Mitchell	John T. Mitchell
	DCHH	JOKELA	Hearing result for Status Conference held on 05/21/2009 03:30 PM: District Court Hearing Held Court Reporter: JULIE FOLAND Number of Transcript Pages for this hearing estimated: RE: Motion to Disqualify - Set by Judge Mitchell	John T. Mitchell
5/29/2009	ORDR	CLAUSEN	Order RE: Defendant VJ Mortensen's Motion to Strike Plaintiffs' Response to Defendant's Motion to Disqualify Judge for Cause	John T. Mitchell
6/1/2009	ORDR	CLAUSEN	Order on Defendat Vernon Mortensen's Motion to Disqualify	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Status Conference 06/30/2009 10:30 AM) Set By Judge Mitchell	John T. Mitchell

Date	Code	User		Judge
6/1/2009		CLAUSEN	Notice of Hearing	John T. Mitchell
6/2/2009	HRSC	CLAUSEN	Hearing Scheduled (Motion to Withdraw 06/30/2009 10:30 AM) Pickens	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Motion 06/30/2009 10:30 AM) Release Bond - Pickens	John T. Mitchell
6/8/2009	NOHG	BAXLEY	Notice Of Hearing on 06/30/09 at 10:30 AM RE Defendants Motion To Withddraw and Motion For Partial Release of The Bond To Satisfy Attorney Fees Lien	John T. Mitchell
6/11/2009	MEMO	CRUMPACKER	Memorandum Opposiing Motion to Release Bond for Attorneys Lien	John T. Mitchell
6/17/2009	MEMO	COCHRAN	Memorandum in Opposition to Motion for Partial Release of Bond to Pay Attorney's Lien	John T. Mitchell
6/19/2009	MOTN	SREED	Motion for Reconsideration of Defendant's Motion to Disqualify	John T. Mitchell
6/22/2009	MISC	BAXLEY	Response To Akers' Memorandum In Opposition For Partial Release Of Bond To Pay Attorney's Lien	John T. Mitchell
	MISC	BAXLEY	Reply In Support Of Motion To Release Bond For Attorney Fees Lien	John T. Mitchell
6/30/2009	DCHH	CLAUSEN	Hearing result for Status Conference held on 06/30/2009 10:30 AM: District Court Hearing Hel Court Reporter: JULIE FOLAND	John T. Mitchell
	DCHH	CLAUSEN	Hearing result for Motion held on 06/30/2009 10:30 AM: District Court Hearing Held Court Reporter: JULIE FOLAND	John T. Mitchell
	DCHH	CLAUSEN	Hearing result for Motion to Withdraw held on 06/30/2009 10:30 AM: District Court Hearing Hel Court Reporter: JULIE FOLAND	John T. Mitchell
	ORDR	CLAUSEN	Memorandum Decision and Order on Defendant Vernon Mortensen's Motion for Reconsideration of Denial of Defendant Vernon Mortensen's Motion to Disqualify	John T. Mitchell
7/8/2009	ORDR	CLAUSEN	Memorandum Decision and Order Denying Defendant Vernon Mortensen's Motion for Partial Release of Bond to Satisfy Attorney Fees Lien	John T. Mitchell
	ORDR	CLAUSEN	Order Granting Motion to Withdraw as Attorney of Record	John T. Mitchell
7/9/2009	AFFD	LEU	Affidavit Of Terri R. Pickens	John T. Mitchell
7/13/2009	AFSV	BAXLEY	Affidavit Of Service on 07/09/09 served by mail Vernon J Mortenson	John T. Mitchell
	MOTN	CRUMPACKER	Motion to Release Cash Bond	John T. Mitchell
7/24/2009	NOAP	SREED	Notice Of Appearance - Vernon Mortensen	John T. Mitchell
8/14/2009	HRSC	CLAUSEN	Hearing Scheduled (Status Conference 10/08/2009 02:00 PM) Set By Judge Mitchell - 1 Hour	John T. Mitchell

Date	Code	User		Judge
8/14/2009		CLAUSEN	Notice of Hearing	John T. Mitchell
10/8/2009	DCHH	CLAUSEN	Hearing result for Status Conference held on 10/08/2009 02:00 PM: District Court Hearing Held Court Reporter: JULIE FOLAND	John T. Mitchell
	ORDR	CLAUSEN	Order for Mediation and Order Following Status Conference	John T. Mitchell
10/9/2009	HRSC	CLAUSEN	Hearing Scheduled (Oral Argument on Appeal 11/30/2009 04:00 PM)	John T. Mitchell
10/15/2009	LETR	CLAUSEN	Letter RE: Mediation	John T. Mitchell
10/20/2009	PBRF	CRUMPACKER	Plaintiff's Status Conference Brief RE: Burdens of Proof	John T. Mitchell
10/22/2009	BRIE	HUFFMAN	Brief of Defendants White Re: Proof of Easement Location	John T. Mitchell
	MEMO	CRUMPACKER	Memorandum Re: Burden of Proof by Marti Mortensen	John T. Mitchell
10/30/2009	BRIE	HUFFMAN	Brief of Defendant Vernon J Mortensen	John T. Mitchell
11/23/2009	MOTN	COCHRAN	Motion to Order Transfer or Release Bond	John T. Mitchell
	AFFD	COCHRAN	Affidavit of Marti Mortensen Supporting Motion to Release Bond	John T. Mitchell
	MEMO	COCHRAN	Memorandum Supporting Motion to Transfer or Release Bond	John T. Mitchell
11/24/2009	HRSC	CLAUSEN	Hearing Scheduled (Motion 12/29/2009 10:00 AM) Release Bond - Diesner	John T. Mitchell
12/1/2009	DCHH	CLAUSEN	Hearing result for Oral Argument on Appeal held on 11/30/2009 04:00 PM: District Court Hearing Held Court Reporter: JULIE FOLAND	John T. Mitchell
	ORDR	CLAUSEN	Order Regarding Burdens of Proof, and Order Establishing Briefing Schedule on Easement Location	John T. Mitchell
12/2/2009	FILE	SHEDLOCK	New File Created *****File #14*****	John T. Mitchell
12/7/2009	MERN	BAXLEY	Mediation Results-Case NOT Resolved by Mediation	John T. Mitchell
12/22/2009	BRIE	COCHRAN	Brief in Opposition of Releasing Mortensen Bond Money from the Court - Sworn Affidavit of Vernon J Mortensen included	John T. Mitchell
12/29/2009	DCHH	CLAUSEN	Hearing result for Motion held on 12/29/2009 10:00 AM: District Court Hearing Held Court Reporter: JULIE FOLAND TAKEN UNDER ADVISEMENT	John T. Mitchell
1/8/2010	ORDR	CLAUSEN	Memorandum Decision and Order Granting Defendant Marti Mortensen's Motion to Order Transfer or Release of Bond	John T. Mitchell
1/15/2010	STIP	PARKER	Stipulation to Order Extending Briefing Schedule	John T. Mitchell

Date	Code	User	Judge
1/20/2010	BNDV	RICKARD	Bond Converted (Transaction number 126 dated 1/20/2010 amount 317,248.97)
1/21/2010	ORDR	CLAUSEN	Order Extending Briefing Schedule
	MOTN	COCHRAN	Motion for Order for Entry Upon Land
1/22/2010	MOTN	BAXLEY	Motion For Extending Briefing Schedule
	DBRF	BAXLEY	Brief Of Vernon J Mortensen Supporting Location Of Easement
3/4/2010	HRSC	CLAUSEN	Hearing Scheduled (Hearing on Appeal 04/28/2010 11:00 AM) Remand - Weeks
3/29/2010	BRIE	SHEDLOCK	Brief Of Defendants White RE: Section 24 Easement Location
	HRSC	CLAUSEN	Hearing Scheduled (Motion for Summary Judgment 05/27/2010 04:00 PM) Partial - Diesner 1 Hour
3/30/2010	MNSJ	CRUMPACKER	Motion For Partial Summary Judgment Re: Punitive Damages Against Marti Mortensen
	AFFD	CRUMPACKER	Affidavit of Marti Mortensen
	NOHG	CRUMPACKER	Notice Of Hearing Motion for partial Summary Judgment
4/12/2010	HRSC	CLAUSEN	Hearing Scheduled (Motion 05/27/2010 04:00 PM) Remand - Weeks
4/14/2010	MEMO	HARWOOD	Memorandum In Support Of Motion To Strike Marti Mortensen's Motion For Summary Judgment
	NOHG	HARWOOD	Notice Of Hearing On Motion To Strike Marti Mortensen's Motion For Summary Judgment - April 28, 2010 - 11:00 AM
4/15/2010	HRSC	CLAUSEN	Hearing Scheduled (Motion 05/19/2010 02:00 PM) Exonerate Bond - Covington
4/20/2010	NOHG	CRUMPACKER	Notice Of Hearing on Remand
4/27/2010	MISC	CRUMPACKER	Response to Motion to Strike
	NOHG	HUFFMAN	Amended Notice Of Hearing of Hearing And Motion to Strike Marti Mortensen's Motion for Summary Judgment
4/28/2010	DCHH	CLAUSEN	Hearing result for Motion held on 04/28/2010 11:00 AM: District Court Hearing Held Court Reporter: JULIE FOLAND TAKEN UNDER ADVISEMENT
5/3/2010	ORDR	CLAUSEN	Memorandum Decision and Order Granting Plaintiffs' Motion to Strike Defendant Marti Mortensen's Motion for Summary Judgment
5/4/2010	NOHG	BAXLEY	Notice Of Hearing on 05/19/10 at 2:00 pm RE Motion to Release Cash Bond

Date	Code	User	Judge
5/14/2010	HRVC	CLAUSEN	Hearing result for Motion for Summary Judgment held on 05/27/2010 04:00 PM: Hearing Vacated Partial - Diesner 1 Hour
	HRSC	CLAUSEN	Hearing Scheduled (Motion 07/01/2010 04:00 PM) Remand - Weeks - 1 Hour
	HRVC	CLAUSEN	Hearing result for Motion held on 05/27/2010 04:00 PM: Hearing Vacated Remand - Weeks
5/19/2010	DCHH	CLAUSEN	Hearing result for Motion held on 05/19/2010 02:00 PM: District Court Hearing Held Court Reporter: JULIE FOLAND MOTION GRANTED
	BNDV	RICKARD	Bond Converted (Transaction number 1231 dated 5/19/2010 amount 154,048.97)
	ORDR	RICKARD	Order Exonerating And Releasing Cash Bond Of Defendants White
6/16/2010	FILE	HUFFMAN	New File ***** 15 of 15 *****
6/17/2010	BRIE	HUFFMAN	Plaintiffs' Brief on Second Remand Regarding Location of Easement
6/24/2010	BRIE	HARWOOD	Reply Brief Of Defendants White RE: Section 24 Easement Location
6/30/2010	AFFD	VICTORIN	Affidavit of Mike Hathaway
	MOTN	VICTORIN	Motion to Admit Additional Evidence RE: Easement Location
7/1/2010	ORDR	CLAUSEN	Minute Entry Order Credit for Time Served
	DCHH	CLAUSEN	Hearing result for Motion held on 07/01/2010 04:00 PM: District Court Hearing Held Court Reporter: JULIE FOLAND
8/12/2010	HRSC	CLAUSEN	Hearing Scheduled (Motion 11/24/2010 02:30 PM) Consider Additional Evid - Covington
9/29/2010	ORDR	CLAUSEN	Memorandum Decision, Findings of Fact, Conclusions of Law and Order RE: Easement Location
	HRSC	CLAUSEN	Hearing Scheduled (Motion 11/24/2010 02:00 PM) Damages - Weeks
11/10/2010	MEMO	CRUMPACKER	Plaintiffs Memorandum on Second Remand re: Damages
	NOHG	CRUMPACKER	Notice Of Hearing on Remand re: Damages
11/17/2010	MEMO	ROSENBUSCH	Marti Mortensen's Memorandum Re: Damages
11/19/2010	HRSC	CLAUSEN	Hearing Scheduled (Motion 01/26/2011 02:30 PM) Damages - Weeks; 1 Hour
	HRVC	CLAUSEN	Hearing result for Motion held on 11/24/2010 02:00 PM: Hearing Vacated Damages - Weeks
	HRSC	CLAUSEN	Hearing Scheduled (Motion 01/26/2011 02:30 PM) Consider Additional Evid - Covington; 1 hour

Date	Code	User	Judge
11/19/2010	HRVC	CLAUSEN	Hearing result for Motion held on 11/24/2010 02:30 PM: Hearing Vacated Consider Additional Evid - Covington
	ANHR	ROSENBUSCH	Amended Notice Of Hearing on Remand Re: Damages
1/18/2011	BRIE	LISONBEE	Reply Brief Of Defendants White
1/19/2011	AFFD	CRUMPACKER	Supplemental Affidavit of Mike Hathaway
	MEMO	LISONBEE	Plaintiffs' Reply Memorandum On Second Remand Re: Damages
1/24/2011	MOTN	BAXLEY	Motion For Shortening Time Period For Notice And Setting Hearing On The Motion To Correct Findings Of Fact, Conclusions Of Law And Order filed 01/02/03 AND Memorandum Decision And Order On Reconsideration, On New Trial Issues And Additional Findings Of Fact, Conclusions Of Law Regarding Damages And Order Filed on 04/01/04
	MOTN	BAXLEY	Motion To Correct Findings Of Fact, Conclusions Of Law And Order Filed 01/02/03 AND Memorandum Decision And Order On Reconsideration, On New Trial Issues And Additional Findings Of Fact, Conclusions Of Law Regarding Damages and Order filed on 04/01/04
	AFIS	BAXLEY	Affidavit In Support of Motion To Correct Findings Of Fact, Conclusions Of Law And Order Filed 01/02/03 AND Memorandum Decision And Order On Reconsideration, On New Trial Issues And Additional Findings Of Fact, Conclusions Of Law Regarding Damages and Order Filed on 04/01/04
1/25/2011	MEMO	BAXLEY	Plaintiffs' Reply Memorandum To Defendants Whites' Reply Brief On Second Remand RE Damages
	AFFD	BAXLEY	Supplemental Affidavit Of Mike Hathaway
	NOTH	ROSENBUSCH	Notice Of Hearing
1/26/2011	MOTN	CLAUSEN	Motion to Shorten Time
	NOTH	CLAUSEN	Notice Of Hearing for Motion to Shorten Time
	NOTH	CLAUSEN	Notice of Hearing - Amended to change time
	INHD	JOKELA	Hearing result for Motion held on 01/26/2011 02:30 PM: Interim Hearing Held Consider Additional Evid - Covington; 1 hour
	INHD	JOKELA	Hearing result for Motion held on 01/26/2011 02:30 PM: Interim Hearing Held Damages - Weeks; 1 Hour
	DCHH	JOKELA	District Court Hearing Held Court Reporter: Julie Foland Number of Transcript Pages for this hearing estimated:

Date	Code	User	Judge
1/26/2011	NOTE	JOKELA	Under Advisement
	ANHR	BAXLEY	SECOND AMENDED Notice Of Hearing On Remand RE Damages [correcting hearing time to 2:30 pm]
1/31/2011	HRSC	CLAUSEN	Hearing Scheduled (Motion 02/16/2011 04:00 PM) Correct Findings and Fact; Mortensen
	NOHG	CRUMPACKER	Notice Of Hearing
2/10/2011	MOTN	BIELEC	Motion For Extension Of Time To File Response To Jerry Mortensen's Motion To Correct Findings Of Fact And Conclusions Of Law And Motion For Reconsideration On New Trial Issues And Additional Findings Of Fact and Conclusions Of Law Regarding Damages
	MOTN	BIELEC	Amended Motion For Extension Of Time To File Response To Jerry Mortensen's Motion To Correct Findings Of Fact And Conclusions Of Law And Motion For Reconsideration On New Trial Issues And Additional Findings Of Fact and Conclusions Of Law Regarding Damages
2/11/2011	MISC	CRUMPACKER	Response to Motion to Correct Findings of Fact & Conclusions of Law & Motion for Reconsideration on New Trial Issues & Additional Findings of Fact & Conclusions of Law Regarding Damages
2/14/2011	HRVC	CLAUSEN	Hearing result for Motion held on 02/16/2011 04:00 PM: Hearing Vacated Correct Findings and Fact; Mortensen
	HRSC	CLAUSEN	Hearing Scheduled (Motion 03/22/2011 04:00 PM) Correct Findings and Fact; Mortensen
2/15/2011	ANHR	BAXLEY	Amended Notice Of Hearing Of Jerry Mortensen's Motion To Amend Correct Findings on 03/22/11 at 4:00 pm
2/16/2011	MEMO	BAXLEY	Post-Hearing Memorandum RE White's Motion To Admit Additional Evidence RE Easement Location
	MISC	BAXLEY	Supplemental Citation RE Motion To Admit Additional Evidence RE Easement Location
2/18/2011	MISC	ROSENBUSCH	Reply to Akers Post-Hearing Memorandum Re: Whites' Motion to Admit Additional Evidence Re: Easement Location
3/18/2011	ORDR	CLAUSEN	Memorandum Decision and Order on Remand RE: Damages, and Order Denying Whites' Motion for Additional Evidence on Easement Location
3/22/2011	DCHH	CLAUSEN	Hearing result for Motion held on 03/22/2011 04:00 PM: District Court Hearing Held Court Reporter: JULIE FOLAND

Date	Code	User	Judge
4/5/2011	MOTN	ROSEBUSCH	Motion to Reconsider Memorandum Decision and Order on Remand Re: Damages, and Order Denying Whites' Motion for Additional Evidence on Easement Location John T. Mitchell
5/23/2011	ORDR	CLAUSEN	Memo Decision & Order Denying: 1) Deft Vernon Mortensen's Affd on Motion to Correct Findings of Fact, Conclusions of Law & Order, Filed 1-2-3 & Memo Decision & Order on Reconsideration of New Trial Issues & Additional Findings of Fact, Conclusion of Law Regarding Damages & Order Filed 4-1-04 & 2) Deft Vernon Mortensen's Motion to Reconsider Memo Decision & Order on Remand RE: Damages & Order Denying White's Motion for Additional Evidence on Easment Location John T. Mitchell
5/24/2011	FILE	SREED	New File Created *****FILE 16***** John T. Mitchell
8/10/2011	CVDI	CLEVELAND	Civil Disposition entered for: DL White Construction Inc, Defendant; Mortensen, Marti Ellen, Defendant; Mortensen, Vernon Jerry, Defendant; White, David L, Defendant; White, Michelle Virginia, Defendant; Akers, Dennis Lyle, Plaintiff; Akers, Sherrie L, Plaintiff. Filing date: 8/10/2011 John T. Mitchell
	FJDE	CLEVELAND	Fourth AMENDED Judgment and Decree on Second Remand John T. Mitchell
8/24/2011	HRSC	CLAUSEN	Hearing Scheduled (Motion to Reconsider 10/19/2011 03:30 PM) Covington - 30 min John T. Mitchell
	MOTN	BAXLEY	Motion To Reconsider John T. Mitchell
	NOHG	BAXLEY	Notice Of Hearing on 10/09/11 at 3:30 pm. John T. Mitchell
	MCAF	BAXLEY	Plaintiffs' Supplemental Memorandum Of Costs (Including Attorney Fees Incurred Through August 24, 2011) John T. Mitchell
	AFIS	BAXLEY	IRCP 54(e)(3) and (e)(5) Affidavit Of Susan P Weeks In Support of Plaintiffs' Claims For Attorney Fees On Second Remand John T. Mitchell
9/7/2011	OBJT	DEGLMAN	Objection to the Motion to Disallow Claimed Attorney Fees John T. Mitchell
9/8/2011		VICTORIN	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Dustin Deissner Receipt number: 0038203 Dated: 9/8/2011 Amount: \$101.00 (Check) For: Mortensen, Marti Ellen (defendant) John T. Mitchell
	BNDC	VICTORIN	Bond Posted - Cash (Receipt 38204 Dated 9/8/2011 for 100.00) John T. Mitchell
	APSC	SREED	Appealed To The Supreme Court John T. Mitchell

Date	Code	User	Judge
9/21/2011		LEU	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Mortensen, Vernon Jerry (defendant) Receipt number: 0040068 Dated: 9/21/2011 Amount: \$101.00 (Cash) For: Mortensen, Vernon Jerry (defendant)
	BNDK	LEU	Bond Posted - Cash (Receipt 40069 Dated 9/21/2011 for 100.00)
	APSC	SREED	Appealed To The Supreme Court - Vernon Mortensen
9/30/2011	ORDR	SREED	Order from Idaho Supreme Court Suspending Appeal
	NOTC	SREED	AMENDED Notice of Appeal
10/4/2011	HRVC	CLAUSEN	Hearing result for Motion to Reconsider scheduled on 10/19/2011 03:30 PM: Hearing Vacated Covington - 30 min
	HRSC	CLAUSEN	Hearing Scheduled (Motion to Reconsider 11/08/2011 04:00 PM) Covington - 30 min
	HRSC	CLAUSEN	Hearing Scheduled (Motion 11/08/2011 04:00 PM) Objection to Attys fees and costs; Covington 1 hour
10/6/2011	OBJT	CRUMPACKER	Opposition to Motion to Reconsider
10/7/2011	NOHG	BAXLEY	Notice Of Hearing on 11/08/11 at 4:00 pm
10/25/2011	MEMO	BAXLEY	Memorandum In Support Of Objection To Claim For Attorney Fees
11/1/2011	MNET	BAXLEY	Motion For Extension Of Time
11/2/2011	MISC	VIGIL	Plaintiff's Response to Defendant White's Motion to Disallow Attorney Fees
11/7/2011	ORDR	SREED	Order Consolidating Appeals (From Idaho Supreme Court)
11/8/2011	DCHH	CLAUSEN	Hearing result for Motion to Reconsider scheduled on 11/08/2011 04:00 PM: District Court Hearing Held Court Reporter: JULIE FOLAND
	DCHH	CLAUSEN	Hearing result for Motion scheduled on 11/08/2011 04:00 PM: District Court Hearing Hel Court Reporter: JULIE FOLAND
11/16/2011	ORDR	CLAUSEN	Memorandum Decision and Order Denying Whites' Motion to Reconsider and Granting Akers' Claims for Attorney Fees
12/13/2011		CLEVELAND	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Robert Covington, Attorney Trust Account Receipt number: 0051175 Dated: 12/13/2011 Amount: \$101.00 (Check) For: White, David L (defendant) and White, Michelle Virginia (defendant)

Date: 2/6/2012

First Judicial District Court - Kootenai County

User: SREED

Time: 11:12 AM

ROA Report

Page 28 of 28

Case: CV-2002-0000222 Current Judge: John T. Mitchell
Dennis Lyle Akers, etal. vs. DL White Construction Inc, etal.

Date	Code	User		Judge
12/14/2011	NOTC	SREED	Notice of Appeal - Robert Covington OBO DL White Construction Inc; David L. White & Michelle White	John T. Mitchell
12/29/2011	NOTE	SREED	Appeal and Original Exhibits Mailed to Supreme Court via FedEx - Exhibits Returned 1/5/12	John T. Mitchell
1/3/2012	FILE	HUFFMAN	New File ***** 17 *****	John T. Mitchell
	FJDE	HUFFMAN	Fifth Amended Judgment And Decree on Second Remand	John T. Mitchell
1/5/2012	ORDR	SREED	Order Consolidating Appeals by Order of Supreme Court	John T. Mitchell

TABLE OF CONTENTS

REGISTER OF ACTIONS	1
TABLE OF CONTENTS.....	29
INDEX	36
MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY FILED MAY 4, 2009	43
MOTION TO DISQUALIFY FILED MAY 4, 2009	48
MEMORANDUM IN RESPONSE TO DEFENDANT V.J. MORTENSEN'S MOTION TO DISQUALIFY FOR CAUSE FILED MAY 15, 2009	50
MEMORANDUM IN RESPONSE TO DEFENDANT V.J. MORTENSEN'S MOTION TO STRIKE PLAINTIFFS' RESPONSE TO V.J. MORTENSEN'S MOTION TO DISQUALIFY FOR CAUSE FILED MAY 20, 2009	77
ORDER RE: DEFENDANT V.J. MORTENSEN'S MOTION TO STRIKE PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISQUALIFY THE JUDGE FOR CAUSE FILED MAY 29, 2009	82
ORDER ON DEFENDANT VERNON MORTENSEN'S MOTION TO DISQUALIFY FILED JUNE 1, 2009	84
MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION TO DISQUALIFY FILED JUNE 19, 2009	91
RESPONSE TO AKERS' MEMORANDUM IN OPPOSITION FOR PARTIAL RELEASE OF BOND TO PAY ATTORNEY'S LEIN FILED JUNE 22, 2009	95
REPLY IN SUPPORT OF MOTION TO RELEASE BOND FOR ATTORNEY FEES LIEN FILED JUNE 22, 2009	99

TABLE OF CONTENTS (CONTD.) PAGE NO.

MEMORANDUM DECISION AND ORDER ON DEFENDANT VERNON MORTENSEN'S MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT VERNON MORTENSEN'S MOTION TO DISQUALIFY FILED JUNE 30, 2009	113
MEMORANDUM DECISION AND ORDER DENYING DEFENDANT VERNON MORTENSEN'S MOTION FOR PARTIAL RELEASE OF BOND TO SATISFY ATTORNEY FEES LIEN FILED JULY 8, 2009	121
ORDER GRANTING MOTION TO WITHDRAW AS ATTORNEY OF RECORD FILED JULY 8, 2009	130
NOTICE OF APPEARANCE FILED JULY 24, 2009	133
ORDER FOR MEDIATION, AND ORDER FOLLOWING STATUS CONFERENCE FILED OCTOBER 8, 2009.....	136
BRIEF OF DEFENDANTS WHITE RE: PROOF OF EASEMENT LOCATION FILED OCTOBER 22, 2009.....	139
MEMORANDUM RE: BURDEN OF PROOF BY MARTI MORENSEN FILED OCTOBER 22, 2009.....	142
BRIEF OF DEFENDANT VERNON J. MORTENSEN RE: BURDEN OF PROOF OF EASEMENT LOCATION FILED OCTOBER 30, 2009.....	148
ORDER REGARDING BURDENS OF PROOF, AND ORDER ESTABLISHING BRIEFING SCHEDULE ON EASEMENT LOCATION FILED DECEMBER 1, 2009	153
MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT MARTI MORTENSEN'S MOTION TO ORDER TRANSFER OR RELEASE OF BOND FILED JANUARY 8, 2010.....	156

TABLE OF CONTENTS (CONTD.) PAGE NO.

ORDER EXTENDING BRIEFING SCHEDULE FILED JANUARY 21, 2010.....	164
BRIEF OF VERNON J. MORTENSEN SUPPORTING LOCATION OF EASEMENT FILED JANUARY 22, 2010.....	167
BRIEF OF DEFENDANTS WHITE RE: SECTION 24 EASEMENT LOCATION FILED MARCH 29, 2010.....	173
AFFIDAVIT OF MARTI MORTENSEN FILED MARCH 30, 2010.....	206
MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PUNITIVE DAMAGES AGAINST MARTI MORTENSEN FILED MARCH 30, 2010.....	209
MEMORANDUM IN SUPPORT OF MOTION TO STRIKE MARTI MORTENSEN'S MOTION FOR SUMMARY JUDGMENT FILED APRIL 14, 2010.....	217
RESPONSE TO MOTION TO STRIKE FILED APRIL 27, 2010.....	222
MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE DEFENDANT MARTI MORTENSEN'S MOTION FOR SUMMARY JUDGMENT FILED MAY 3, 2010.....	226
PLAINTIFFS' BRIEF ON SECOND REMAND REGARDING LOCATION OF EASEMENT FILED JUNE 17, 2010	233
REPLY BRIEF OF DEFENDANTS WHITE RE: SECTION 24 EASEMENT LOCATION FILED JUNE 24, 2010	340
AFFIDAVIT OF MIKE HATHAWAY FILED JUNE 30, 2010	344

TABLE OF CONTENTS (CONTD.) PAGE NO.

MOTION TO ADMIT ADDITIONAL EVIDENCE RE: EASEMENT LOCATION FILED JUNE 30, 2010	358
MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE: EASEMENT LOCATION FILED SEPTEMBER 29, 2010	368
PLAINTIFFS' MEMORANDUM ON SECOND REMAND RE: DAMAGES FILED NOVEMBER 10, 2010.....	389
MARTI MORTENSEN'S MEMORANDUM RE: DAMAGES FILED NOVEMBER 17, 2010.....	397
REPLY BRIEF OF DEFENDANTS WHITE FILED JANUARY 18, 2011.....	407
SUPPLEMENTAL AFFIDAVIT OF MIKE HATHAWAY FILED JANUARY 19, 2011.....	415
PLAINTIFFS' REPLY MEMORANDUM ON SECOND REMAND RE: DAMAGES FILED JANUARY 19, 2011.....	419
MOTION TO CORRECT FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER filed 1-2-03 AND MEMORANDUM DECISION AND ORDER ON RECONSIDERATION, ON NEW TRIAL ISSUES AND ADDITIONAL FINDINGS OF FACT, CONCLUSIONS OF LAW REGARDING DAMAMGES AND ORDER filed 4-1-04 FILED JANUARY 24, 2011.....	432
AFFIDAVIT IN SUPPORT OF MOTION TO CORRECT FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, filed 1-2-03 AND MEMORANDUM DECISION AND ORDER ON RECONSIDERATION ON NEW TRIAL ISSUES, AND ADDITIONAL FINDINGS OF FACT, CONCLUSIONS OF LAW REGARDING DAMAGES AND ORDER FILED 4-1-04 FILED JANUARY 24, 2011.....	435
PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANTS WHITES' "REPLY" BRIEF ON SECOND REMAND RE: DAMAGES FILED JANUARY 25, 2011.....	469

TABLE OF CONTENTS (CONTD.) PAGE NO.

SUPPLEMENTAL AFFIDAVIT OF MIKE HATHAWAY FILED JANUARY 24, 2011.....	477
RESPONSD E TO MOTION TO CORRECT FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MOTION FOR RECONSIDERATION ON NEW TRIAL ISSUES AND ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DAMAGES FILED FEBRUARY 11, 2011	482
POST-HEARING MEMORANDUM RE: WHITE’S MOTION TO ADMIT ADDITIONAL EVIDENCE RE: EASEMENT LOCATION FILED FEBRUARY 16, 2011	495
REPLY TO AKERS POST-HEARING MEMORANDUM RE: WHITES’ MOTION TO ADMIT ADDITIONAL EVIDENCE RE: EASEMENT LOCATION FILED FEBRUARY 18, 2011	499
MEMORANDUM DECISION AND ORDER ON REMAND RE: DAMAGES, AND ORDER DENYING WHITES’ MOTION FOR ADDITIONAL EVIDENCE ON EASEMENT LOCATION FILED MARCH 18, 2011.....	505
MOTION TO RECONSIDER MEMORANDUM DECISION AND ORDER ON REMAND RE: DAMAGES, AND ORDER DENYING WHITES’ MOTION FOR ADDITIONAL EVIDENCE ON EASMENT LOCATION FILED APRIL 4, 2011	545
MEMORANDUM DECISION AND ORDER DENYING: 1) DEFENDANT VERNON MORTENSEN’S “AFFIDAVIT ON MOTION TO CORRECT FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, FILED 1-2-3 AND MEMORANDUM DECISION AND ORDER ON RECONSIDERATION ON NEW TRIAL ISSUES, AND ADDITIONAL FINDINGS OF FACT, CONCLUSIONS OF LAW REGARDING DAMAGES AND ORDER FILED 4-1-04” AND 2) DEFENDANT VERNON MORTENSEN’S MOTION TO RECONSIDER MEMORANDUM DECISION AND ORDER ON REMAND RE: DAMAGES AND ORDER DENYING WHITE’S MOTION FOR ADDITIONAL EVIDENCE ON EASEMENT LOCATION FILED MAY 23, 2011	570

TABLE OF CONTENTS (CONTD.) PAGE NO.

FOURTH AMENDED JUDGMENT AND DECREE ON SECOND REMAND	
FILED AUGUST 10, 2011	606
MOTION TO RECONSIDER	
FILED AUGUST 24, 2011	610
PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF COSTS (INCLUDING ATTORNEY FEES INCURRED THROUGH AUGUST 24, 2011)	
FILED AUGUST 24, 2011	612
I.R.C.P. 54(e)(3) and (e)(5) AFFIDAVIT OF SUSAN P. WEEKS IN SUPPORT OF PLAINTIFFS' CLAIMS FOR ATTORNEY FEES ON SECOND REMAND	
FILED AUGUST 24, 2011	616
OBJECTION TO AND MOTION TO DISALLOW CLAIMED ATTORNEY FEES	
FILED SEPTEMBER 7, 2011	629
NOTICE OF APPEAL	
FILED SEPTEMBER 8, 2011	633
NOTICE OF APPEAL	
FILED SEPTEMBER 21, 2011	642
NOTICE OF APPEAL (AMENDED)	
FILED SEPTEMBER 30, 2011	652
MEMORANDUM IN SUPPORT OF OBJECTION TO CLAIM FOR ATTORNEY FEES	
FILED OCTOBER 25, 2011	661
PLAINTIFFS' RESPONSE TO DEFENDANT WHITE'S MOTION TO DISALLOW ATTORNEY FEES	
FILED NOVEMBER 2, 2011	669
ORDER CONSOLIDATING APPEALS	
FILED NOVEMBER 7, 2011	680

TABLE OF CONTENTS (CONTD.) PAGE NO.

MEMORANDUM DECISION AND ORDER DENYING WHITES' MOTION TO RECONSIDER AND GRANTING AKERS' CLAIM FILED NOVEMBER 16, 2011	682
NOTICE OF APPEAL FILED DECEMBER 13, 2011	702
CERTIFICATE OF EXHIBITS.....	708
CLERK'S CERTIFICATE	717
CLERK'S CERTIFICATE OF SERVICE.....	719

INDEX

AFFIDAVIT IN SUPPORT OF MOTION TO CORRECT FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, filed 1-2-03 AND MEMORANDUM DECISION AND ORDER ON RECONSIDERATION ON NEW TRIAL ISSUES, AND ADDITIONAL FINDINGS OF FACT, CONCLUSIONS OF LAW REGARDING DAMAGES AND ORDER FILED 4-1-04 FILED JANUARY 24, 2011.....	435
AFFIDAVIT OF MARTI MORTENSEN FILED MARCH 30, 2010.....	206
AFFIDAVIT OF MIKE HATHAWAY FILED JUNE 30, 2010	344
BRIEF OF DEFENDANT VERNON J. MORTENSEN RE: BURDEN OF PROOF OF EASEMENT LOCATION FILED OCTOBER 30, 2009.....	148
BRIEF OF DEFENDANTS WHITE RE: PROOF OF EASEMENT LOCATION FILED OCTOBER 22, 2009.....	139
BRIEF OF DEFENDANTS WHITE RE: SECTION 24 EASEMENT LOCATION FILED MARCH 29, 2010.....	173
BRIEF OF VERNON J. MORTENSEN SUPPORTING LOCATION OF EASEMENT FILED JANUARY 22, 2010.....	167
CERTIFICATE OF EXHIBITS.....	708
CLERK'S CERTIFICATE OF SERVICE.....	719
CLERK'S CERTIFICATE	717
FOURTH AMENDED JUDGMENT AND DECREE ONS SECOND REMAND FILED AUGUST 10, 2011	606

INDEX (CONTD.)..... PAGE NO.

I.R.C.P. 54(e)(3) and (e)(5) AFFIDAVIT OF SUSAN P. WEEKS IN SUPPORT OF PLAINTIFFS' CLAIMS FOR ATTORNEY FEES ON SECOND REMAND FILED AUGUST 24, 2011	616
INDEX	36
MARTI MORTENSEN'S MEMORANDUM RE: DAMAGES FILED NOVEMBER 17, 2010.....	397
MEMORANDUM DECISION AND ORDER DENYING DEFENDANT VERNON MORTENSEN'S MOTION FOR PARTIAL RELEASE OF BOND TO SATISFY ATTORNEY FEES LIEN FILED JULY 8, 2009	121
MEMORANDUM DECISION AND ORDER DENYING WHITES' MOTION TO RECONSIDER AND GRANTING AKERS' CLAIM FILED NOVEMBER 16, 2011.....	682
MEMORANDUM DECISION AND ORDER DENYING: 1) DEFENDANT VERNON MORTENSEN'S "AFFIDAVIT ON MOTION TO CORRECT FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, FILED 1-2-3 AND MEMORANDUM DECISION AND ORDER ON RECONSIDERATION ON NEW TRIAL ISSUES, AND ADDITIONAL FINDINGS OF FACT, CONCLUSIONS OF LAW REGARDING DAMAGES AND ORDER FILED 4-1-04" AND 2) DEFENDANT VERNON MORTENSEN'S MOTION TO RECONSIDER MEMORANDUM DECISION AND ORDER ON REMAND RE: DAMAGES AND ORDER DENYING WHITE'S MOTION FOR ADDITIONAL EVIDENCE ON EASEMENT LOCATION FILED MAY 23, 2011	570
MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT MARTI MORTENSEN'S MOTION TO ORDER TRANSFER OR RELEASE OF BOND FILED JANUARY 8, 2010.....	156
MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE DEFENDANT MARTI MORTENSEN'S MOTION FOR SUMMARY JUDGMENT FILED MAY 3, 2010.....	226

INDEX (CONTD.)..... PAGE NO.

MEMORANDUM DECISION AND ORDER ON DEFENDANT VERNON MORTENSEN'S MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT VERNON MORTENSEN'S MOTION TO DISQUALIFY FILED JUNE 30, 2009	113
MEMORANDUM DECISION AND ORDER ON REMAND RE: DAMAGES, AND ORDER DENYING WHITES' MOTION FOR ADDITIONAL EVIDENCE ON EASEMENT LOCATION FILED MARCH 18, 2011.....	505
MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE: EASEMENT LOCATION FILED SEPTEMBER 29, 2010	368
MEMORANDUM IN RESPONSE TO DEFENDANT V.J. MORTENSEN'S MOTION TO DISQUALIFY FOR CAUSE FILED MAY 15, 2009	50
MEMORANDUM IN RESPONSE TO DEFENDANT V.J. MORTENSEN'S MOTION TO STRIKE PLAINTIFFS' RESPONSE TO V.J. MORTENSEN'S MOTION TO DISQUALIFY FOR CAUSE FILED MAY 20, 2009	77
MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY FILED MAY 4, 2009	43
MEMORANDUM IN SUPPORT OF MOTION TO STRIKE MARTI MORTENSEN'S MOTION FOR SUMMARY JUDGMENT FILED APRIL 14, 2010.....	217
MEMORANDUM IN SUPPORT OF OBJECTION TO CLAIM FOR ATTORNEY FEES FILED OCTOBER 25, 2011.....	661
MEMORANDUM RE: BURDEN OF PROOF BY MARTI MORENSEN FILED OCTOBER 22, 2009.....	142
MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PUNITIVE DAMAGES AGAINST MARTI MORTENSEN FILED MARCH 30, 2010.....	209

INDEX (CONTD.)..... PAGE NO.

MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION TO DISQUALIFY FILED JUNE 19, 2009	91
MOTION TO ADMIT ADDITIONAL EVIDENCE RE: EASEMENT LOCATION FILED JUNE 30, 2010	358
MOTION TO CORRECT FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER filed 1-2-03AND MEMORANDUM DECISION AND ORDER ON RECONSIDERATION, ON NEW TRIAL ISSUES AND ADDITIONAL FINDINGS OF FACT, CONCLUSIONS OF LAW REGARDING DAMAMGES AND ORDER filed 4-1-04 FILED JANUARY 24, 2011.....	432
MOTION TO DISQUALIFY FILED MAY 4, 2009	48
MOTION TO RECONSIDER MEMORANDUM DECISION AND ORDER ON REMAND RE: DAMAGES, AND ORDER DENYING WHITES' MOTION FOR ADDITIONAL EVIDENCE ON EASMENT LOCATION FILED APRIL 4, 2011	545
MOTION TO RECONSIDER FILED AUGUST 24, 2011	610
NOTICE OF APPEAL (AMENDED) FILED SEPTEMBER 30, 2011	652
NOTICE OF APPEAL FILED DECEMBER 13, 2011	702
NOTICE OF APPEAL FILED SEPTEMBER 21, 2011	642
NOTICE OF APPEAL FILED SEPTEMBER 8, 2011	633
NOTICE OF APPEARANCE FILED JULY 24, 2009	133

INDEX (CONTD.)..... PAGE NO.

**OBJECTION TO AND MOTION TO DISALLOW CLAIMED
ATTORNEY FEES**

FILED SEPTEMBER 7, 2011629

ORDER CONSOLIDATING APPEALS

FILED NOVEMBER 7, 2011680

ORDER EXTENDING BRIEFING SCHEDULE

FILED JANUARY 21, 2010164

**ORDER FOR MEDIATION, AND ORDER FOLLOWING STATUS
CONFERENCE**

FILED OCTOBER 8, 2009136

**ORDER GRANTING MOTION TO WITHDRAW AS ATTORNEY OF
RECORD**

FILED JULY 8, 2009130

**ORDER ON DEFENDANT VERNON MORTENSEN'S MOTION TO
DISQUALIFY**

FILED JUNE 1, 200984

**ORDER RE: DEFENDANT V.J. MORTENSEN'S MOTION TO STRIKE
PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO
DISQUALIFY THE JUDGE FOR CAUSE**

FILED MAY 29, 200982

**ORDER REGARDING BURDENS OF PROOF, AND ORDER
ESTABLISHING BRIEFING SCHEDULE ON EASEMENT LOCATION**

FILED DECEMBER 1, 2009153

**PLAINTIFFS' BRIEF ON SECOND REMAND REGARDING LOCATION
OF EASEMENT**

FILED JUNE 17, 2010233

**PLAINTIFFS' MEMORANDUM ON SECOND REMAND RE:
DAMAGES**

FILED NOVEMBER 10, 2010389

**PLAINTIFFS' REPLY MEMORANDUM ON SECOND REMAND
RE: DAMAGES**

FILED JANUARY 19, 2011419

INDEX (CONTD.)..... PAGE NO.

PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANTS WHITES' "REPLY" BRIEF ON SECOND REMAND RE: DAMAGES FILED JANUARY 25, 2011.....	469
PLAINTIFFS' RESPONSE TO DEFENDANT WHITE'S MOTION TO DISALLOW ATTORNEY FEES FILED NOVEMBER 2, 2011	669
PLAINTIFFS' SUPPLMENTAL MEMORANDUM OF COSTS (INCLUDING ATTORNEY FEES INCURRED THROUGH AUGUST 24, 2011) FILED AUGUST 24, 2011	612
POST-HEARING MEMORANDUM RE: WHITE'S MOTION TO ADMIT ADDITIONAL EVIDENCE RE: EASEMENT LOCATION FILED FEBRUARY 16, 2011	495
REGISTER OF ACTIONS	1
REPLY BRIEF OF DEFENDANTS WHITE RE: SECTION 24 EASEMENT LOCATION FILED JUNE 24, 2010	340
REPLY BRIEF OF DEFENDANTS WHITE FILED JANUARY 18, 2011	407
REPLY IN SUPPORT OF MOTION TO RELEASE BOND FOR ATTORNEY FEES LIEN FILED JUNE 22, 2009	99
REPLY TO AKERS POST-HEARING MEMORANDUM RE: WHITES' MOTION TO ADMIT ADDITIONAL EVIDENCE RE: EASEMENT LOCATION FILED FEBRUARY 18, 2011	499
RESPONSD E TO MOTION TO CORRECT FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MOTION FOR RECONSIDERATION ON NEW TRIAL ISSUES AND ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DAMAGES FILED FEBRUARY 11, 2011	482

INDEX (CONTD.)..... PAGE NO.

RESPONSE TO AKERS' MEMORANDUM IN OPPOSITION FOR PARTIAL RELEASE OF BOND TO PAY ATTORNEY'S LEIN FILED JUNE 22, 2009	95
RESPONSE TO MOTION TO STRIKE FILED APRIL 27, 2010.....	222
SUPPLEMENTAL AFFIDAVIT OF MIKE HATHAWAY FILED JANUARY 19, 2011.....	415
SUPPLEMENTAL AFFIDAVIT OF MIKE HATHAWAY FILED JANUARY 24, 2011.....	477
TABLE OF CONTENTS.....	29

longer capable of being fair and impartial enough to follow the Idaho Supreme Court's directives on remand. Thus, Mortensen respectfully requests that this Court recuse itself from the case and allow a different district judge to take over to make additional findings of fact consistent with the Idaho Supreme Court's most recent decision.

1. I.R.C.P. 40(d)(2)

The Idaho Rules of Civil Procedure set forth the method by which parties may seek disqualification of a district court judge based on cause. The rule states in relevant part:

(A) Grounds. Any party to an action may disqualify a judge or magistrate for cause from presiding in any action upon any of the following grounds:

1. That the judge or magistrate is a party, or is interested, in the action or proceeding.
2. That the judge or magistrate is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.
3. That the judge or magistrate has been attorney or counsel for any party in the action or proceeding.

4. That the judge or magistrate is biased or prejudiced for or against any party or the case in the action.

(B) Motion for Disqualification. Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.

I.R.C.P. 40(d)(2) (emphasis added). A party may move to disqualify a judge from presiding on the grounds of bias. I.R.C.P. 40(d)(2)(A)(4). An affidavit "stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion" must accompany the motion. I.R.C.P. 40(d)(2)(B). Adverse rulings, by themselves, do not demonstrate

disqualifying bias. *Bell v. Bell*, 122 Idaho 520, 530, 835 P.2d 1331, 1341 (Ct. App. 1992). To be disqualifying, the alleged bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Desfosses v. Desfosses*, 120 Idaho 27, 29, 813 P.2d 366, 368 (Ct. App. 1991) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 86 S. Ct. 1698, 1710, 16 L. Ed. 2d 778, 793 (1966)). A judge's participation in prior legal proceedings involving related parties or issues is not grounds for disqualification for bias. *Roselle v. Heirs and Devisees of Grover*, 117 Idaho 530, 534, 789 P.2d 526, 530 (Ct. App. 1990). The appellate court reviews the denial of a motion to disqualify for cause under an abuse of discretion standard. *Samuel v. Hepworth, Nungester & Lezamiz*, 134 Idaho 84, 88 (2000) (citing *Smith v. Smith*, 124 Idaho 431, 435, 860 P.2d 634, 638 (1993)).

In this case, the Idaho Supreme Court suggested in its original decision that this case be reassigned to another district judge. For the reasons set forth in the accompanying Affidavit of Terri R. Pickens, Mortensen respectfully requests that this Court do just that, and reassign this case to a different judge.

2. Idaho Code of Judicial Conduct

The Idaho Code of Judicial Conduct also mandates that a district court judge recuse himself when there is any indication that bias may be present. The rule states:

E. Disqualification.

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) **the judge has a personal bias or prejudice concerning a party or a party's lawyer**, or has personal knowledge of disputed evidentiary facts that might reasonably affect the judge's impartiality in the proceedings;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

I.R.P.C., Canon 3(E) (emphasis added). The decision to deny a motion for disqualification on the grounds of prejudice and bias is within the sound discretion of the trial court. *Idaho First Nat'l Bank v. David Steed & Assoc.*, 121 Idaho 356, 363, 825 P.2d 79, 87 (1992). The issue is whether the trial judge understands that the decision is a discretionary matter, acts within the boundaries of his discretion and consistent with the available legal choices, and reaches his denial of the motion by an exercise of reason. *Smith v. Smith*, 124 Idaho 431 (1993).

Moreover, the Court should show respect to litigants and their counsel. The Idaho Rules of Judicial Conduct state:

(5) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.


I.R.J.C., Cannon 3(b).

In this case, Mortensen asserts that this Court has made several comments on the record and in its decisions that show a clear indication of biased against Mortensen and Mortensen's counsel. The Idaho Rules of Judicial Conduct require judges to act dignified and courteous to litigants and their counsel. In this Court's written decisions, there are several attacks on Mortensen and counsel, including name calling and allegations of untruthfulness. Such comments are not appropriate under the rules and show some motivation other than a fair and just outcome.

Because this Court has such strong feelings against Mortensen, it should recuse itself from the remaining portion of the case to provide fundamental fairness in this litigation.

DATED this 30 day of April, 2009.

PICKENS LAW, P.A.

By: 
Terri R. Pickens

CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of April, 2009, I caused to be served a true and accurate copy of the foregoing instrument by delivering the same to the following:

Susan P. Weeks
James, Vernon & Weeks P.A.
1626 Lincoln Way
Coeur d'Alene, Idaho 83814


☐ Hand Delivery
☐ U.S. Mail
☐ Overnight Mail
☒ Facsimile (208) 664-1684

Robert E. Covington
8884 N. Government Way, Suite A
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Dustin Deissner
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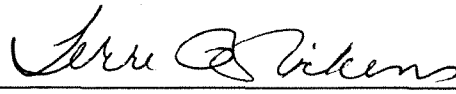
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Terri R. Pickens

Defendant Mortensen fears he will not receive a fair hearing because of the specifically described prejudice or bias of Judge Mitchell set forth in more detail in the Affidavit of Terri R. Pickens filed concurrently herewith. Oral argument is requested on this motion.

DATED this 30 day of April, 2009.

PICKENS LAW, P.A.

By: 
Terri R. Pickens

CERTIFICATE OF SERVICE

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Attorneys for: Plaintiffs

#146
 STATE OF IDAHO } SS
 COUNTY OF KOOTENAI
 FILED MAY 15, 2009
 AT 3:00 O'CLOCK P M
 CLERK, DISTRICT COURT
Kathleen

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.
 AKERS, husband and wife,

Plaintiffs,

vs.

D. L. WHITE CONSTRUCTION, INC.
 DAVID L. WHITE and MICHELLE
 WHITE, husband and wife; and VERNON
 MORTENSEN and MARTI E. MORTENSEN,
 husband and wife,

Defendants.

Case No. CV-02-222

MEMORANDUM IN RESPONSE TO
 DEFENDANT V.J. MORTENSEN'S
 MOTION TO DISQUALIFY FOR CAUSE

I. Grounds for Motion

Defendant Vernon J. Mortensen has moved to disqualify the trial judge for cause pursuant to Rule 40(d)(2)(A)(4) on the grounds that the judge is biased or prejudiced against Mr. Mortensen. The first ground for the motion supplied in the memorandum was that the Supreme Court suggested in its original decision that the case be reassigned to another district judge on remand. The second ground given was that the Idaho Code of Judicial Conduct Canon 3(E)(1)(a) mandates that a district

court judge recuse himself when the judge has a personal bias or prejudice concerning a party or a party's lawyer. The final ground provided in support of the motion is that a Court is required to show respect to litigants and their counsel. Vernon Mortensen contends that the court has made several comments on the record and in its decision that show bias against Mortensen and Mortensen's counsel, and has attacked them in the trial court's decision, including name calling and allegations of untruthfulness, which display strong feelings against the litigant.

II. Standard for Disqualification for Cause

Upon the filing of a motion for disqualification, the presiding judge is without authority to act further in such action except to grant or deny such motion for disqualification. I.R.C.P. 40(d)(5). Idaho Rule of Civil Procedure 40(d)(2) requires the judge "sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions."

When a court is faced with a motion to disqualify for bias or prejudice under I.R.C.P. 40(d)(2), the trial judge need only conclude that he can properly perform the legal analysis which the law requires of him. *State v. Pratt*, 128 Idaho 207 (Ct. App. 912 P.2d 94 (1996)). Adverse rulings in the case do not disqualify the judge; in order to be grounds for disqualification, bias must stem from the judge forming opinion on merits of case on some basis other than what has been learned from presiding over it. *Desfosses v. Desfosses*, 122 Idaho 634, 836 P.2d 1095 (Ct.App. 1992); *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct.App. 1992); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 996 P.2d 303, (2000). In order for disqualification to be appropriate under I.R.C.P. 40(d)(2)(A)(4), the alleged prejudice must stem from an extra-judicial source. *Dept. of Health and Welfare v. Doe*, 133 Idaho 826, 992 P.2d 1226 (Ct. App.1999). Any such disqualification for cause shall be accompanied by an affidavit of the party or the party's attorney

stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Rule 40(d)(2)(B). The moving party bears the burden of providing facts to support the stated grounds for disqualification and suspicion, surmise, speculation, rationalization, conjecture, innuendo, and statements of mere conclusions may not be substituted for a statement of facts. *DesFosses v. DesFosses*, 120 Idaho 27, 813 P.2d 366 (Ct.App.1991).

III. Analysis

A. Allegations of Inappropriate Comments in Findings 1

In paragraph 3 of Terri Pickens's affidavit, she asserts that in entering its Findings of Fact, Conclusions of Law and Order ("Findings 1 ") after the first phase of the trial that this court included several unnecessary, incorrect and disparaging comments about Vernon Mortensen.

Ms. Pickens's affidavit takes issue with the trial court's finding that Defendants intentionally misrepresented to their agents, employees, the County Building Inspector, the Kootenai County Sheriff and the public that defendants had a legal right to engage in the activities on plaintiffs' property previously discussed in the trial court's findings, especially in light of the fact that the Supreme Court has twice affirmed Mortensen's easement rights, confirming his legal right to use, maintain and repair the road on Plaintiffs' property. The trial court's entire findings addressed Defendants activities in the disputed triangle area, the curved approach, and the areas beyond the express easement. Therefore, even though the Supreme Court has affirmed that Mortensen had an express easement over Government Lot 2, it has sustained the trial court's finding that Mortensen did not have a right to use the curved approach, and that his easement rights beyond Government Lot 2 were prescriptive in nature, which holding limits the degree of rights Mortensen has beyond Government Lot 2 to those limited rights of a holder of a prescriptive easement. The Supreme Court has remanded the issue of the scope of the prescriptive easement and the work outside the

express and prescriptive easement areas for the trial court to further refine and address to determine if the trespass claims are still valid given the Supreme Court decision. Mortensen points to nothing that shows that this finding stemmed from an extra-judicial source. Rather, his argument is that it was an adverse ruling that was modified on appeal or remanded with further directive and is therefore inappropriate and displays prejudice. Mortensen cites no case law to support this argument. To the contrary, the case law is clear that an adverse ruling does not establish bias. Merely because the Supreme Court has modified and/or rejected some of the trial court's rulings that were adverse to Mortensen does not equate to bias and prejudice.

Mortensen's next ground that the trial court is biased and prejudiced is that the trial court has utilized an extra-judicial source (Plaintiff's arguments) that Defendant Mortensen has violated the Subdivision Ordinance on prior occasions and has thereby harmed innocent purchasers of property. Mortensen claims there is no evidence in the record to support this finding. Plaintiff's surveyor, Scott Rasor, gave testimony regarding Mr. Mortensen's prior subdivision activity and harm to individuals. Tr Vol. II, p. 538, Ll. 19-25; pp. 539-540; p. 541, Ll. 1-5.

The next complaint is that the trial court issued a temporary restraining order and then found that defendants violated it. Defendant Mortensen arrives at this conclusion by arguing that the Supreme Court determined that the finding regarding violation of the restraining order was held to be erroneous in *Akers I*. Defendant Mortensen misperceives the ruling in *Akers I*. The Supreme Court had no issue before it in *Akers I* about whether the trial court erred in finding Defendant Mortensen violated the temporary restraining order entered by the trial court. The issue cited by Defendant Mortensen concerned whether Akers' permission to use the access road outside the express easement was relevant to the issue of prescriptive easement when that easement was established prior to Akers' ownership. It in no way addressed the temporary restraining order.

Further, the finding of violation of the temporary restraining order by the trial court was supported by the facts heard at trial. This argument tries to claim bias based upon an adverse ruling with which Defendant Mortensen disagrees.

Defendant Mortensen also takes issue with the finding that the court received testimony from Mr. Mortensen that he never asked Akers for permission to use any portion of the road since he purchased his property in 1994 and Dennis Akers testified that he gave permission to Mortensen to use the road. Defendant Mortensen claims the Idaho Supreme Court found this Conclusion of Law to be clearly erroneous in *Akers I* wherein the Supreme Court discussed that Akers claim of granting permission to Mortensen to use an easement that had already been established by prescription was irrelevant. The Supreme Court did not hold this finding incorrect, it held it irrelevant to the issue of the prescriptive easement. Nonetheless, the trial court's finding accurately recited contradictory evidence it received. Mortensen fails to explain how recognition of this fact by the trial court established bias or prejudice. Again, it is merely a ruling to which Mortensen takes exception that was supported by facts in the record.

Defendant Mortensen also claims that the trial court erred in finding that Defendants willfully trespassed on plaintiffs' property. Mortensen concludes that the trial court is biased or prejudiced merely because the Supreme Court has remanded this issue to be re-examined by the trial court on remand in both of its decision. Apparently it is Mortensen's position that if a trial court commits error that is corrected on appeal that such a fact establishes bias or prejudice. There is no case law that supports this argument. If one were to accept this proposition, every trial court would be disqualified for cause on remand if the opinion were not completely affirmed.

Mortensen's final conclusion in support of this argument is that "many more of this Court's findings and conclusions were found to be clearly erroneous by the Idaho Supreme Court in *Akers I*.

(Conversely, many of the trial court's findings and conclusion were found to be correct in *Akers I.*) Fundamentally, this argument avoids the analysis that is required by the rule and case law to disqualify for cause. Mortensen wishes to make the leap of faith that because the Supreme Court found error by the trial court and remanded the matter, such action equates to bias and prejudice on the part of the trial court when it made its findings or upon remand. There are no facts to support this conclusion and it is contrary to law.

B. Allegations of Inappropriate Comments in Findings 2

Mortensen also claims after Phase 2 of the trial that the trial court made unnecessary, incorrect and disparaging comments about Mortensen and his counsel. Mortensen claims that the court's remarks violated the Idaho Rules of Judicial Conduct requiring judges to be patient, dignified and courteous to lawyers and litigants.

The specifics cited by Mortensen are that the trial court commented in its second finding that at the September 2, 2003 hearing, it became apparent to the court that the evidence that what defense counsel claimed was 'newly discovered evidence' had been in defendant's possession since at least January 2003. Thus, the trial court concluded that as of August 2003, when the motion was made for a new trial on the grounds of "newly discovered evidence" that it was not newly discovered as defendant had been aware of it for at least eight months. Nonetheless, the trial court allowed defendants to re-open the case and present more evidence.

Mortensen claims his major issue with this comment was that it inappropriately challenged the credibility of defense counsel, in violation of the Idaho Rules of Judicial Conduct. Mortensen contends in the spring of 2003, this Court had already issued its Findings 1, so any information learned after that time would have been newly discovered. While it is true that information that was discovered after the first phase of the trial was newly discovered, the court's issue was that the

matter was not brought to the court's attention until over *seven months* after it was discovered. By then, it was information that had been known for over half a year. This comment was not discourteous to defense. It merely pointed out that the matter should have been brought to the trial court's attention in a timelier manner.

Mortensen also take offense with the trial court characterizing his arguments as lengthy and unsupported by facts. The argument which the trial court was discussing was an argument by Mortensen that the express easement spanned from the approach from Milsap Loop Road, all the way though Government Lot 2, crossing over the Section line, and then turning onto Defendants' property. It is neither a violation of the rules of judicial conduct or a showing of bias for a court to comment that the argument of counsel was lengthy or unsupported by facts. It is merely a statement that the trial court was unpersuaded by the argument of counsel. Certainly a trial court has the latitude to express that opinion without being guilty of discourtesy or bias.

Mortensen also claims that this finding was reversed by the Supreme Court in *Akers I*. Again, how this fact demonstrates or supports a showing of bias or prejudice is not articulated by Mortensen and leaves the conclusion of bias to conjecture. Further, it is not correct. The Supreme Court did not find that the express easement crossed the section line. It determined that any easement beyond Government Lot 2 was prescriptive.

Mortensen next claims that the trial courts comments regarding his attempts to have Akers prosecuted in an effort to manipulate the legal system, to intimidate Plaintiffs and to misuse the legal system to gain advantage in a civil proceeding by use of a criminal proceeding was a direct attack on against Mortensen, and completely unfounded by any testimony at trial. At trial, the court received testimony that Mortensen attempted to have Dennis Akers prosecuted for a battery that never occurred. (Tr Vol. III, p. 1239, Ll. 16-25; p. 1240; p. 1241; Trial Exhibit 310). It is not bias

or prejudice for the trial court to find Akers' testimony credible and to reach a conclusion regarding Mortensen's motivation in taking such action during the dispute.

Along these same lines, Mortensen takes exception to the trial court's finding that "Defendant Vernon Mortensen further threatened, intimidated and attempted to incite Akers while on Plaintiffs' real property by physically approaching Mr. Akers in a threatening manner and cursing at him. . ." and that "Defendant Vernon Mortensen intentionally rammed Akers' truck with a bulldozer." Mortensen claims these statements are a direct attack on him, and impermissible by the Idaho Rules of Judicial Conduct. Contrary to Mortensen's claim, these findings were supported by testimony presented at trial. Tr Vol. III, pp. 1241-1242. It is merely an adverse ruling with which Mortensen takes issue.

Mortensen tries to recharacterize the incident with the truck by claiming that Akers testimony was that Mortensen could not stop his equipment in time and hit Akers truck. However, Mr. Akers exact words were: "Basically what I did was I come down and the first time this happened I was able to pull my pickup in and stop them from dumping any more dirt. Well, Mortensen already knew that that's what I was gonna do, so he just came up, and as I pulled into that he just rammed the truck." Tr Vol. III, p. 1242, L. 17-22.

Mortensen apparently takes the view that it is discourteous for the court to believe testimony and rely upon it which places him in a less than favorable light. Mortensen confuses politeness in the court room with credibility. While the rules require politeness in the conduct of court proceedings, they do not require the court to ignore credibility or to avoid entering findings which a party deems offensive because they do not paint the litigant's out of court behavior in a favorable light.

Along these same lines, Mortensen contends it was an inappropriate attack on him for the trial court to find Mortensen intentionally drove through Akers' barbed wire fence. In support of this contention, Mortensen claims Bill Reynolds testified that Mortensen slid off the road due to snow and ice. The testimony cited by Mortensen in support of this contention was actually about driving through the disputed triangle area in an exchange between Mr. Reynolds and Mr. Reagan as follows:

- Q. Prior to the placement of fill was that grass area sloped?
A. Yes, it was a down slope.
Q. Do you know whether or not it would've been safe without placing any fill material to try and make a corner through that sloped area?
A. Yes, it was safe.
Q. How do you know?
A. Well, I've drove over it.
Q. You drove over it?
A. I have. Certainly. I've drove over it. Peplinski used to drive over it all the time.
Q. So we're talking about coming around the corner and driving through that sloped area?
A. Yeah.
Q. Would that be through this triangle area?
A. He drove up right the way you showed the tracks there and probably sometimes cut across a little bit at the top left-hand corner depending on what he was in.
Q. So turning through this area?
A. Right.
Q. Just turning through it?
A. Right.
Q. Right through that slope on the grass?
A. Well, your front end is clear up on the driveway before you turn or as you're turning. It wasn't sloped that bad.
Q. How many times did you drive on it like that?
A. How many times? I don't know. I've drove quite a few different times. No reason to go up there every day, but through the years I've drove over it quite a few times.
Q. And what kind of vehicles did you drive then?
A. Oh, a car or a pickup.
Q. And were they sloped over going through that area?
A. A little. No worse probably than turning and going up the hill the other way.
Q. Okay. Did you ever try doing that when it was slick?
A. I don't think so, no.
Q. Do you think it might have been a little bit dangerous to do when it was slick?
A. It's getting a little faster.
Q. Pardon me?

A. I don't think it'd be dangerous, no.

(Tr Vol. I, p. 176, Ll. 8-25; p. 177, p. 178, Ll. 1-4.

The actual testimony that Mr. Reynolds gave was that he did not see Mortensen hit the fence, but that Mortensen could plainly see there was no room to make it around Akers vehicles that were parked on the curved approach. (Tr Vol I, p. 168, p. 169, Ll. 1-12.) Mortensen acknowledged in his testimony that the curved portion of the road was blocked and marked "no trespassing" and he chose to disregard the sign. Tr Vol I, p. 249, Ll. 13-25; p. 250-252; p. 253, Ll. 1-17. Mortensen's complaint is that he disagrees with the conclusion of the court given these facts that his act that caused damage to the fence were intentional and show the court has an extra-judicial bias against him. Once again, the claim of bias arises from an adverse ruling with which Mortensen disagrees.

Mortensen also claims the trial court's finding that Bill Reynolds' testimony was credible showed bias against him. Mortensen concludes that this finding by the Court went far beyond a personal attack on Mortensen, as it was unsubstantiated and a personal opinion of this Court and should not have been put into a decision of law.

It was well within the purview of trial court to weigh evidence and determine credibility of witnesses. Mortensen argues that the trial court's conclusion that Mr. Reynolds' testimony illustrated Mortensen's belief that he could do whatever he wanted without consequence clearly demonstrates bias against Mortensen. This finding was substantiated by facts received by the trial court. Mr. Reynolds, a neighboring property owner, testified regarding his observation of the activity conducted by Mortensen during the course of the dispute. Mr. Reynolds testified that Akers kept the access road well maintained. Tr Vol I, pp. 51-53; 59. Mr. Reynolds testified David White extended the prescriptive easement road beyond the area where it existed. Tr Vol. I, pp. 74-75. Mr.

Reynolds testified the defendants hired Shaun Montee to dig the prescriptive easement portion of the road down, provided Mr. Montee had a copy of a previous lawsuit as authority to proceed, and that the paperwork presented to Mr. Reynolds did not define any right to alter the road. Tr Vol. I, pp 78-81. Mr. Reynolds testified that the road as it existed in 1966 did not include Akers' curved approach installed in the 1980's. Tr Vol. I, pp. 84-86. Mr. Reynolds testified that White's dump trucks dumped 5-6 loads of dirt on the access road which made the access road impassable, while Mortensen operated the dozer. Tr Vol. I, p. 88-89. Mr. Reynolds testified they tore out a gate post. Tr Vol. I, p. 92. Mr. Reynolds testified they left the area a mess. Tr Vol. I, p. 96-98. Mr. Reynolds testified Defendants busted up the finish on the road by driving the Cat up and down it. (Tr Vol. I, p. 99-104. Mr. Reynolds testified Defendants tore a gate out after a no trespassing sign was posted. Tr Vol. I, p. 113-114. Mr. Reynolds testified to a conversation with Mortensen about the necessity of dumping fill dirt on the road wherein Mortensen told Mr. Reynolds that he was dumping the dirt not for purposes of maintaining the easement, but rather because he wanted to go to court and he figured dumping the dirt would force the issue. Tr Vol. I, p. 153. In addition, the Court had for review several pictures which substantiated Mr. Reynolds testimony and showed the work that was being done was not maintenance work, but rather an expansion of the easement areas and to damage the access road under the guise of "maintenance". The trial court did not demonstrate bias from an extra-judicial source toward Mortensen. Rather, it was persuaded by evidence received at trial that Mortensen's acts were intentional and done without regard of consequences.

Mortensen also claims the Court's finding that he made a conscious effort to mislead the Akers and the Court in an effort to hide the significant value of his income and assets suggests Mortensen is a liar. Mortensen does not contend that this finding isn't supported by facts adduced at trial. Apparently, Mortensen surmises that the code of ethics requirement of courteous conduct

during judicial proceedings precludes stating the obvious. It is not a violation for the Court to determine that a witness is not being truthful or is prevaricating. That is the function of a court in weighing the credibility of a witness.

C. Allegations of Direct and Inappropriate Attacks Against Defense Counsel in the Order on Remand

Mortensen's counsel takes umbrage with some of the Court's findings on remand. The first such statement is the court's discussion that since it was defendants' burden to establish the (back) road did not exist, one can only guess there was a deliberate reason for defense counsel to not cover this issue in more detail with their witness, Mr. Millsap. Mortensen surmises, without facts or argument, that this statement by the trial is contrary to the Idaho Rules of Judicial Conduct and an inappropriate attack on counsel. Pointing out a failure in proof does not violate Idaho Rules of Judicial Conduct. It is neither discourteous for the trial court to explain where the failure occurred nor is it a personal attack on counsel. The Supreme Court in *Akers II* pointed out this same failure, although in a somewhat different manner, when it noted: "During William Millsap's testimony, Appellants' counsel asked whether there was access to the property by means other than the access road running through the Akers' property. William Millsap answered: '*Uh, no, not that we ever used.*' (emphasis added)." Similarly, Mortensen claims it is a personal attack for the trial court to assume in his discussion on the burden of proof that the trial attorney had a specific reason for the line of questioning pursued by him. This argument is perplexing. Most courts would assume that a trial attorney had a reason for pursuing a line of questioning at trial (relevance) and a purpose in the way questions were couched (meeting the burden of proof). Otherwise, there would be no purpose in presenting evidence.

Mortensen claims that the comment of the court that Defendants excavated outside the prescriptive easement area and damaged the area where Akers gave permission to use the property

and beyond shows bias against Defendants because the Court acknowledged that they were excavating on their own property, but then indicated they needed permission to do so from Akers. Mortensen concludes this finding was contrary to any fundamental elements of law, and was properly reversed in *Akers II*. In *Akers II*, the trial court reversed the finding on the scope of the prescriptive easement and remanded the issue of whether there was a trespass beyond the scope of the prescriptive easement. On remand, it is still possible that the trial court may find that Defendants excavated outside the scope of the prescriptive easement, including the permitted use area. However, such a finding does not in and of itself show bias merely because some of the excavation may have occurred within the scope of the prescriptive easement.

Mortensen also argues it was a direct attack for the court to state that it was beyond cavil how defendants could have thought that they had any right to perform earthwork (beyond the Government Lot 2 section line) when at best they had to litigate to have any prescriptive right established across Parcel B. Mortensen suggests on remand that for the trial court to suggest otherwise simply furthers their case for bias. Mortensen doesn't explain *how* this statement could be interpreted as a direct attack. At best, it is an adverse ruling with which Mortensen disagrees. Further, Mortensen's attempt at a preemptive strike against the trial court's future rulings on remand does not show further bias on the part of the trial court. The trial court is entitled to make whatever findings it finds is supported by the evidence, even if Mortensen disagrees with the rulings.

The fact that it is an adverse ruling with which Mortensen disagrees is made clear by the further argument of Mortensen in support of his position. Mortensen contends that the trial court found, and Akers testified, that the earth work was done on White's property. The previously cited testimony of Mr. Reynolds indicated the earthwork Mr. Reynolds observed went beyond the existing road in the disputed prescriptive easement area. Further, Mortensen misunderstands the

Court's ruling. The Court's ruling when read in context within the Order was that some of the earthwork was done on White's property; some was done in the prescriptive easement area; some was done in the permitted extension road; and some may have occurred beyond the permitted extension area. Merely because Mortensen does not agree with this view of the evidence, it was supported by testimony at trial.

Further, Mortensen is incorrect that Akers testified that the work in Parcel B occurred only within the prescriptive easement area. Akers testified that Defendants altered the depth and direction of the road. Tr Vol II, p. 574-575. Reynolds testified to the same.

Mortensen also claims that the court violated its responsibility to be courteous by and personally attacked Mortensen when the trial court found Mortensen chose to act like a bully. This finding is not a personal attack motivated by bias or prejudice. The trial court was assessing the acts of Defendants which supported an award of punitive damages. The court was required to determine whether Defendants' acts constituted oppressive, fraudulent, wanton, malicious or outrageous conduct. I.C. § 16-604. The trial court was enunciating the reasons that the acts engaged in by Defendant rose to the level of those for which punitive damages were available as a remedy. Any party who is found to have engaged in acts that subject them to punitive damages will have their acts characterized in less than a flattering light. However, that does not amount to a personal attack on the litigant. If Mortensen's logic were followed, punitive damages could never be awarded because any finding of such behavior that offended the litigant's sensitivities would be disallowed.

Mortensen also claims that the trial court's observation that Mortensen should have resorted to the court to define the scope of their prescriptive easement across Parcel B given the facts known to them and their reprehensible conduct leading up to and during the litigation can be only be explained by a determination that the trial court was prejudiced or biased. This claim is pure

conjecture, surmise and speculation. The trial court explained fully why it found this case to be outside the normal parameters of a quiet title case, and it all hinged on the various inappropriate conducts of Defendants. It in no way relied upon the fact that Defendants brought a counterclaim for quiet title.

D. The Withdrawn Supreme Court Opinion in *Akers II* does not Establish Bias

Mortensen suggests that the trial court should disqualify itself for cause because the Supreme Court's withdrawn opinion in *Akers II* indicated concern that the district judge would find it a difficult and uncomfortable task to revisit and reevaluate the evidence, disregarding his own earlier inappropriate observations and factual determinations, particularly in light of allegations by Appellants that he could not act impartially. What the Supreme Court actually said was that it was concerned that the parties have displayed a high degree of animosity towards each other and the district judge. It did not say the judge had displayed any animosity toward the parties. The Supreme Court conclude that it is in the best interest of all parties involved, including the district judge, to vacate the judgment and remand the case for a new trial before a different district judge due to the inappropriate view of the premises that would continue to influence the trial judge and the hostility between the parties and the hostility the Supreme Court perceived was portrayed toward the district judge by the parties. It did not express concern that the district judge would be biased due to this hostility as implied by Mortensen. This court is in the best position to determine whether it is biased against Mortensen due to any animosity that has been displayed towards the trial court.

Of further note is the fact that the Supreme Court withdrew this opinion following a petition for rehearing. The petition for rehearing pointed out that the trial court made its findings on the easement issues *before* it ever visited the premises (at the instigation of Defendants) and could not have therefore been influenced by an inappropriate view of the premises utilized as evidence when

the initial findings and conclusions were drafted. It also raised that in *Beck v. Beck*, 766 A.2d 482, 485 (Del. 2001), the Delaware supreme court indicated in deciding whether to utilize a different trial judge on remand courts should generally consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Mortensen has presented nothing that demonstrates that this court could not be reasonably expected on remand to have substantial difficulty in putting out of its mind previously expressed views of findings determined to be erroneous based on evidence that was rejected. Rather, Mortensen's primary complaints are that he disagrees with the trial court's findings and he takes exception to some of the trial court's remarks because he believes they were discourteous. Mortensen has failed to demonstrate by the facts cited that the trial court acted in a biased manner.

III. CONCLUSION

Mortensen was allowed to re-open their case to present newly discovered evidence. Despite this fact, Mortensen contends the trial court is biased against him and this bias motivated the trial courts rulings. However, based upon the argument presented, Mortensen's primary complaint is that the trial court did not find disputed facts supported by controverted evidence in his favor. The trial court is not required by the rules of judicial conduct, under the umbrella of "courtesy" to rule in favor of a party. Other than speculation and surmise, Mortensen has presented nothing indicating

this court is biased or prejudiced against him.

Dated this 15th day of May, 2008

JAMES, VERNON & WEEKS, P.A.

By: Susan P. Weeks
Susan P. Weeks
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of May, 2008 a true and correct copy of the foregoing document was served upon the following individuals by facsimile:

FAX: 762-4546 Robert E. Covington 8884 N. Government Way, #A Hayden, ID 83835	FAX: (208) 954-5099 Terry R. Pickens P.O. Box 915 Boise, ID 8371	FAX (509) 326-6978 Dustin Deissner Van Camp & Deissner 1707 W. Broadway Ave. Spokane, WA 99201
-------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------

Susan P. Weeks

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

}SS

#1762

2009 MAY 19 PM 2:45

J.P. >

CLERK DISTRICT COURT

DEPUTY

Terri R. Pickens/ISB #5828
Pickens Law, P.A.
398 South 9th, Suite 240
P.O. Box 915
Boise, ID 83701
Telephone: (208) 954-5090
Facsimile: (208) 954-5099
terri@pickenslawboise.com

Attorney for Defendant Vernon J. Mortensen

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.
AKERS, husband and wife,

Plaintiffs,

vs.

D.L. WHITE CONSTRUCTION, INC.,
DAVID L. WHITE and MICHELLE V.
WHITE, husband and wife; and VERNON J.
MORTENSEN and MARTI E.
MORTENSEN, husband and wife,

Defendants.

Case No. CV 02-222

**DEFENDANTS MOTION TO STRIKE
PLAINTIFF'S MEMORANDUM IN
RESPONSE TO V.J. MORTENSEN'S
MOTION TO DISQUALIFY FOR CAUSE**

Defendant, Vernon J. Mortenson, by and through his counsel of record, Terri R. Pickens of Pickens Law, P.A., hereby moves this Court for an Order striking Plaintiff's Memorandum in Response to Defendant V.J. Mortensen's Motion to Disqualify for Cause on the grounds that said memorandum is untimely according to IRCP 7(b)(3)(E).

Furthermore, Defendant Vernon Mortensen's Attorney, Terri Pickens was with Dustin Deissner, attorney for Defendant Marti Mortenson yesterday (May 18th) when Mr. Deissner DEFENDANTS MOTION TO STRIKE PLAINTIFF'S MEMORANDUM IN RESPONSE TO V.J. MORTENSEN'S MOTION TO DISQUALIFY FOR CAUSE -1

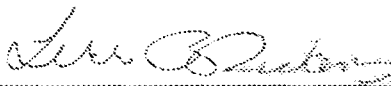
called Susan Weeks stating she was still working on her reply brief, even though it was due Thursday, May 14th.

In addition, Plaintiffs filed an Amended Certificate of Service claiming they were unable to fax the undersigned their response in a timely fashion due to a busy/no response signal from our fax machine. It is not possible to receive a busy/no signal response at this office because we receive our faxes through an internet fax provider giving us no need for a phone line therefore making it impossible to have a busy signal. Plaintiffs misrepresented the alleged service to cover for a missed deadline.

Thus, Defendant Vernon Mortenson respectfully requests that this Court strike Plaintiff's Memorandum in Response to Defendant V.J. Mortensen's Motion to Disqualify for Cause.

DATED this 19th day of May, 2009

PICKENS LAW, P.A.



Terri R. Pickens
Attorneys for Defendant Vernon Mortenson

DEFENDANTS MOTION TO STRIKE PLAINTIFF'S MEMORANDUM IN RESPONSE TO
V.J. MORTENSEN'S MOTION TO DISQUALIFY FOR CAUSE - 2

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of May, 2009, I caused to be served a true and accurate copy of the foregoing instrument by delivering the same to the following:

Susan P. Weeks
James, Vernon & Weeks P.A.
1626 Lincoln Way
Coeur d'Alene, Idaho 83814

_____ Hand Delivery
_____ U.S. Mail
_____ Overnight Mail
☒ _____ Facsimile (208) 664-1684

Robert E. Covington
8884 N. Government Way, Suite A
Hayden, Idaho 83835

_____ Hand Delivery
_____ U.S. Mail
_____ Overnight Mail
☒ _____ Facsimile (208) 762-4546

Dustin Deissner
Van Camp & Deissner
1707 W. Broadway Ave.
Spokane, WA 99201

_____ Hand Delivery
_____ U.S. Mail
_____ Overnight Mail
☒ _____ Facsimile (509) 326-6978



Terri R. Pickens

DEFENDANTS MOTION TO STRIKE PLAINTIFF'S MEMORANDUM IN RESPONSE TO
V.J. MORTENSEN'S MOTION TO DISQUALIFY FOR CAUSE - 3

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: #50

2009 MAY 20 AM 11:23

CLERK DISTRICT COURT

DEPUTY
Tracey Cochran

JAMES, VERNON & WEEKS, P.A.
Attorneys at Law
1626 Lincoln Way
Coeur d' Alene, ID 83814
Telephone: (208) 667-0683
FAX: (208) 664-1684
Leander L. James, ISB#4800
Susan P. Weeks, ISB #4255

Attorneys for: Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.
AKERS, husband and wife,

Plaintiffs,

vs.

D. L. WHITE CONSTRUCTION, INC.;
DAVID L. WHITE and MICHELLE V.
WHITE, husband and wife; and VERNON J.
MORTENSEN and MARTI E. MORTENSEN,
husband and wife,

Defendants.

Case No. CV-02-222

AFFIDAVIT OF WEEKS IN SUPPORT OF
OPPOSITION TO MOTION TO STRIKE

STATE OF IDAHO)

ss.

County of Kootenai)

I, SUSAN P. WEEKS, first being duly sworn upon oath depose and say:

1. I am one of the attorneys of record for the Plaintiffs in the above-captioned action.

2. The information contained herein is based upon my own information and is true and correct, and I am competent to testify thereto.

3. Attached hereto as Exhibit "A" is a copy of the Transmission Verification Report from May 15, 2009, indicating that a 17 page fax of Plaintiffs' Memorandum in Response to Defendant V. J. Mortensen's Motion to Disqualify failed to transmit to facsimile no. (208) 954-5099 because the receiving machine was "busy/no response". The transmitting facsimile machine is set to attempt transmission three times before it ceases transmission. The transmitting facsimile machine is set to generate a transmission verification report for all transmissions and attempted transmissions.

4. Attached hereto as Exhibit "B" are phone messages taken by our receptionist and forwarded to me through our Abacus Law Message Slips program indicating the date and times that I received calls from Dustin Deissner. I did not return Mr. Deissner's calls until May 19, 2009 at approximately 10:45 p.m.

5. I completed and filed with the court clerk by facsimile the Plaintiffs' response brief in opposition to the motion to disqualify on May 15, 2009. I received back a conformed copy by facsimile on May 15, 2009.

6. On May 18, 2009 and May 19, 2009, I was working on briefs in Kootenai County Case No. CV 06-7412 (James v. Landwehr)(brief filed May 20, 2009 at 8:03 a.m.) and Supreme Court Case Docket No. 35119 (Spectra Site, LLC v. Lawrence)(brief due 5/22/09). I did no further

work on the disqualification memorandum after filing it with the court clerk on May 15, 2009.

Susan P. Weeks
Susan P. Weeks

SUBSCRIBED AND SWORN to before me this 20th day of May, 2009.



Christine Elmore
Notary Public for Idaho;
Residing at: Post Falls, ID
Commission Expires: 6/27/2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of May, 2009 a true and correct copy of the foregoing document was served upon the following individuals by facsimile:

FAX: 762-4546 Robert E. Covington 8884 N. Government Way, #A Hayden, ID 83835	FAX: (208) 954-5099 Terry R. Pickens P.O. Box 915 Boise, ID 8371	FAX (509) 326-6978 Dustin Deissner Van Camp & Deissner 1707 W. Broadway Ave. Spokane, WA 99201
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Christine Elmore

TRANSMISSION VERIFICATION REPORT

TIME : 05/15/2009 17:03
NAME : JVW LAW
FAX : 2086641684
TEL : 2086670683
SER.# : 000JB255142

DATE, TIME
FAX NO./NAME
DURATION
PAGE(S)
RESULT
MODE

05/15 17:03
12089545099
00:00:00
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BUSY
STANDARD

BUSY: BUSY/NO RESPONSE

JAMES, VERNON & WEEKS, P.A.
Attorneys at Law
1626 Lincoln Way
Coeur d'Alene, ID 83814
Telephone: (208) 667-0683
FAX: (208) 664-1684
Leander L. James, ISB#4800
Susan P. Weeks, ISB #4255

Attorneys for: Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.
AKERS, husband and wife,

Plaintiffs,

vs.

D. L. WHITE CONSTRUCTION, INC.;
DAVID L. WHITE and MICHELLE V.
WHITE, husband and wife; and VERNON J.
MORTENSEN and MARTI E. MORTENSEN,

Case No. CV-02-222

MEMORANDUM IN RESPONSE TO
DEFENDANT V.J. MORTENSEN'S
MOTION TO DISQUALIFY FOR CAUSE

EXHIBIT

A

0073

MessageSlips

Printed on: 05/20/09

<u>Date</u>	<u>Time</u>	<u>To</u>	<u>From</u>	<u>Name & Matter</u>	<u>Phone</u>
05/14/09	12:20p	SPM	BS		

Please call Dustin Deissner re: Akers v Mortinson 509-326-6935

EXHIBIT B

0074

MessageSlips

Printed on: 05/20/09

Date	Time	To	From	Name & Matter	Phone
05/18/09	1:57p	SPV	BS		

Dustin Diezner (sp?) called. I told him you would most likely get back to him in the morning. He can be reached at 509-326-6935

MessageSlips

Printed on: 05/20/09

Date	Time	To	From	Name & Matter	Phone
05/19/09	9:29a	SPW	BS		
				Please call Dustin Deissner re: Akers 509-326-6935	

JAMES, VERNON & WEEKS, P.A.
Attorneys at Law
1626 Lincoln Way
Coeur d' Alene, ID 83814
Telephone: (208) 667-0683
FAX: (208) 664-1684
Leander L. James, ISB#4800
Susan P. Weeks, ISB #4255

Attorneys for: Plaintiffs

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

#023

2009 MAY 20 AM 10:53

REFAX

#035

CLERK DISTRICT COURT

Jersey Carls
DEPUTY

3rd FAX
#050

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.
AKERS, husband and wife,

Plaintiffs,

vs.

D. L. WHITE CONSTRUCTION, INC.;
DAVID L. WHITE and MICHELLE V.
WHITE, husband and wife; and VERNON J.
MORTENSEN and MARTI E. MORTENSEN,
husband and wife,

Defendants.

Case No. CV-02-222

MEMORANDUM IN RESPONSE TO
DEFENDANT V.J. MORTENSEN'S
MOTION TO STRIKE PLAINTIFFS'
RESPONSE TO V.J. MORTENSEN'S
MOTION TO DISQUALIFY FOR CAUSE

Defendant V. J. Mortensen has requested this court to strike Plaintiffs' response to this Defendant's motion to disqualify the judge for cause. The grounds recited in support of this motion are: (1) the response is not timely; and (2) allegations that the amended certificate of service contains issues of credibility and the brief should be stricken as an sanction for misrepresentations in the amended certificate of service.

MEMORANDUM IN RESPONSE TO V.J. MORTENSEN'S MOTION TO STRIKE
MEMORANDUM IN RESPONSE TO MORTENSEN'S MOTION TO DISQUALIFY FOR
CAUSE - 1

0077

Turning to the first grounds, the response is not untimely. Plaintiffs filed their motion to disqualify the judge on May 4, 2009. The motion and memorandum in support of this motion were faxed to counsel on April 30, 2009 and the affidavit was sent as a pdf attachment to an electronic mail. Although the motion requested oral argument, there was no notice of hearing provided b V.J. Mortensen.

On or about May 6, 2009, Plaintiffs' counsel had staff contact the Court to schedule a hearing on their objection to the motion. The staff member was informed that a status conference notice had been sent scheduling the matter for a status conference on the status of the motion, which was received that day. Plaintiffs did not perceive that a status conference was a hearing on the merits of the motion, but rather a setting by the Court to inquire how the parties wished to proceed on the motion. Plaintiffs wished the Court to be aware that they wished to respond, and therefore filed a responsive brief with the Court on May 15, 2009.

Defendant V.J. Mortensen perceives the status conference as a notice of a hearing on the merits of the motion and requests to have Plaintiffs' memorandum stricken because the memorandum was not received by them until May 18, 2009. Mortensen also call into question the veracity of the amended certificate of service filed by Plaintiffs correcting the court file to reflect that the memorandum was sent to Mortensen May 18, 2009 rather than May 15, 2009 as reflected in the original certificate of service, due to a failed transmission by facsimile.

If Plaintiffs' perception was wrong regarding the purpose of the May 21, 2009 status conference, their brief was untimely, even as of May 15, 2009. However, Defendant V. J. Mortensen details no prejudice to him from the receipt of the brief on May 18, 2009. Rather, his argument is that the Court should strike the brief as a sanction given the date of its arrival at his

counsel's office and concerns regarding the veracity of the explanation regarding the reason for the subsequent May 18, 2009 transmission contained in the amended certificate of service.

The facsimile transmission of the brief to Mortensen on May 15, 2009 failed. After more than one attempt, the transmission attempts discontinued and a report printed which indicated the brief did not transmit to Mortensen because "Busy/No Response". This failure of transmission was not discovered until Monday, May 18, 2009 when filing was being done in the matter. At that time, the brief was again sent to Mortensen's counsel and an amended certificate of service was subsequently prepared and filed with the Court explaining that the memorandum did not transmit on May 15, 2009 and was again transmitted May 18, 2009.

In support of the sanction of striking the memorandum, V.J. Mortensen expresses the opinion that Plaintiffs counsel is not being forthcoming with the Court regarding the events leading to the transmission of the memorandum on May 18, 2009. Mortensen's counsel's expresses the belief that it is impossible for a fax transmission to fail to her office due to a busy line or no response on her line. The transmission verification report has been provided to the court in the Affidavit of Weeks substantiating that this was the report printed by the facsimile machine of Plaintiff's counsel.

Mortensen infers that Plaintiffs' reasons for the subsequent transmission on May 18, 2009 are not true. Defendant's counsel expresses a belief that Plaintiffs' counsel was motivated to mislead this Court because the true reason for the late transmission was that the brief was not completed on May 15, 2009. Mortensen makes a vague reference that she was "with Dustin Deissner, attorney for Defendant Marti Mortensen yesterday (May 18th) when Mr. Deissner called Susan Weeks stating she was still working on her reply brief, even though it was due Thursday, May 14th." As can be seen from the Affidavit of Weeks, Plaintiffs' counsel received messages

through the firm's receptionist that Mr. Dessnier called on May 14, 2009; May 18, and May 19, 2009. She did not return Mr. Dessnier's call until May 19, 2009. The conversation she had with Mr. Dessnier was unrelated to the response brief and the brief was not discussed. If Mr. Dessnier was told by counsel's staff that Plaintiffs' counsel was unavailable on May 14, 2009 because she was working on a brief, it would have been the brief in the instant case. If he was told on May 18 or May 19, 2009 that Plaintiffs' counsel was unavailable because she was working on briefs, it would have been either a brief on an unrelated Kootenai County case or a Supreme Court appeal brief as outlined in the Affidavit of Weeks.

The proposed reason submitted as a motive for Plaintiffs' counsel not to be candid with this court is purely unsupported conjecture and disproved by fact. As the Court can see from the register of actions in this matter, the brief was filed by facsimile with the court on May 15, 2009. Further, a check on May 20, 2009 with Mr. Covington's office staff (Amanda) verified that his transmission was received Friday, May 15, 2009. Under these circumstances, it would not be appropriate to strike the Plaintiffs' brief as a sanction for filing an amended certificate of service properly notifying the court of an amendment to a certificate of service.

Dated this 20th day of May, 2009.

JAMES, VERNON & WEEKS, P.A.

By: Susan P. Weeks
Susan P. Weeks
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of May, 2009 a true and correct copy of the foregoing document was served upon the following individuals by facsimile:

FAX: 762-4546 Robert E. Covington 8884 N. Government Way, #A Hayden, ID 83835	FAX: (208) 954-5099 Terry R. Pickens P.O. Box 915 Boise, ID 8371	FAX (509) 326-6978 Dustin Deissner Van Camp & Deissner 1707 W. Broadway Ave. Spokane, WA 99201
-------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------

Christine Chmose

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED: 5-29-09
AT 10:49 O'CLOCK AM
CLERK, DISTRICT COURT
Jessie Clausen
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.
AKERS, husband and wife,

Plaintiffs,

vs.

D. L. WHITE CONSTRUCTION, INC.;
DAVID L. WHITE and MICHELLE V.
WHITE, husband and wife; and VERNON J.
MORTENSEN and MARTI E. MORTENSEN,
husband and wife,

Defendants.

Case No. CV-02-222

ORDER RE: DEFENDANT V.J.
MORTENSEN'S MOTION TO STRIKE
PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION TO
DISQUALIFY THE JUDGE FOR CAUSE

The Court, having reviewed the entire file and having heard oral argument on Defendant V.J. Mortensen's Motion to Strike Plaintiffs' Response to Defendant's Motion to Disqualify the Judge for Cause, and for the reasons set forth on the record, finds that Defendant has not articulated any prejudice from Plaintiffs' Responsive briefing; therefore, Defendant's motion to strike is denied.

WHEREFORE, Defendant's Motion to Strike Plaintiffs' Response to Defendant's Motion to Disqualify the Judge for Cause is hereby DENIED.

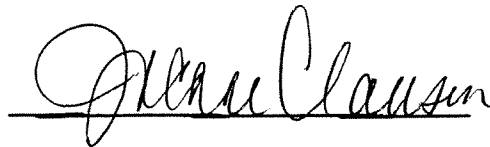
DATED this 29 day of May, 2009.


Honorable Judge John T. Mitchell
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1 day of ^{June} ~~May~~, 2009 a true and correct copy of the foregoing document was served upon the following individuals by facsimile:

FAX: (208) 762-4546 Robert E. Covington 8884 N. Government Way, #A Hayden, ID 83835	FAX: (208) 954-5099 Terry R. Pickens P.O. Box 915 Boise, ID 8371	FAX (509) 326-6978 Dustin Deissner Van Camp & Deissner 1707 W. Broadway Ave. Spokane, WA 99201	FAX (208) 664-0684 Leander L. James James, Vernon & Weeks, P.A. 1626 Lincoln Way Coeur d' Alene, ID 83814
-------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------



FILED 6-1-09

AT 1:30 O'clock P M
CLERK OF DISTRICT COURT

[Signature]
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.)
AKERS, husband and wife,,)

Plaintiffs,)

vs.)

D.L. WHITE CONST., INC., DAVID L.)
WHITE and MICHELLE WHITE, husband)
and wife, and VERNON J. MORTENSEN)
and MARTI E. MORTENSEN, husband and)
wife,)

Defendants.)

Case No. **CV 2002 222**

**ORDER ON DEFENDANT VERNON
MORTENSEN'S MOTION TO
DISQUALIFY**

Defendant Vernon J. Mortensen on May 4, 2009, filed a "Motion to Disqualify" the undersigned pursuant to I.R.C.P. 40(d)(2). No hearing was noticed by Vernon Mortensen.

Because the rule requires a hearing, and since the mere filing of such a motion divests a court of taking any other action in a case until a motion to disqualify is decided, on May 6, 2009, this Court noticed up oral argument on the motion for May 21, 2009. At oral argument, Defendant Vernon J. Mortensen's Motion to Strike Plaintiff's Memorandum in Response to V.J. Mortensen's Motion to Disqualify for Cause was denied, and the Court considered all pleadings submitted on this motion to disqualify. At oral argument on the motion to disqualify, counsel for defendant Vernon J. Mortensen rested on the pleadings, counsel for defendant D.L. White had submitted no written pleading but argued in favor of Vernon J. Mortensen's motion to disqualify, counsel for defendant Marti

E. Mortensen was present but did not take a position on the motion to disqualify, and counsel for plaintiffs argued against the motion to disqualify. At the conclusion of oral argument, the Court took the matter under advisement to re-read past decisions of this Court in this case, and to re-read the decisions of the Idaho Supreme Court in this case, all with an eye toward Vernon Mortensen's claims in his motion to disqualify.

The motion to disqualify claims this Court is biased or prejudiced against Vernon J. Mortensen. In his brief, Vernon Mortensen states "...Mortensen firmly believes that this Court is no longer capable of being fair and impartial enough to follow the Idaho Supreme Court's directives on remand." Memorandum in Support of Motion to Disqualify, pp. 1-2.

In the most recent opinion of the Idaho Supreme Court, filed January 22, 2009, this Court was affirmed in its decision that Appellants (the defendants collectively) do not have an implied easement by prior use and that the appellants' prescriptive easement is 12.2 feet in width. The Idaho Supreme Court reversed this Court judgment as to the location of that part of the prescriptive easement located in Parcel B, the award of damages and the award of attorney's fees and costs. Slip Opinion, pp. 6, 13. Specifically, the Idaho Supreme Court affirmed this Court in its finding that the location of appellants' prescriptive easement across the Akers' property was coextensive with the express easement in Government Lot 2, but held this Court erred when it found that appellants' prescriptive easement turned immediately south upon entering Parcel B. *Id.*, pp. 10-12. The Idaho Supreme Court held: "However, these exhibits, which are aerial photographs of the relevant property, indicate that the access road historically made a more gradual turn resembling a shepherd's crook rather than a 90-degree turn." *Id.*, p. 11. The Idaho Supreme Court further held:

In light of this photographic evidence, we conclude that there is not substantial evidence supporting the district court's conclusion as to the location of Appellants' prescriptive easement on Parcel B. This issue must

be remanded back to the district court for additional fact finding consistent with this opinion.

Id., p. 12. The Idaho Supreme Court then held: "Because the district court must determine the location of Appellants' prescriptive easement in Parcel B on remand, we vacate the district court's award of damages below based upon trespass." *Id.* Finally, as to damages awarded by the district court for negligent infliction of emotional distress and punitive damages, because those damages are "inseparable from consideration of Appellants' easement rights", those damages were vacated. *Id.*, p. 13.

On remand, the directive by the Idaho Supreme Court as to further action by this Court is limited. This Court must locate the prescriptive easement, only on Parcel B, as it follows the path of a shepherd's crook as opposed to a 90 degree bend. Once so located, this Court must also determine if there was a trespass, and if there was, determine damages. No new evidence was ordered to be taken, and no party has requested new evidence be taken.

The Idaho Court of Appeals held in *Desfosses v. Desfosses*, 120 Idaho 27, 30, 813 P.2d 366, 369 (Ct.App. 1991), "A disqualifying prejudice cannot be deduced from adverse rulings by a judge, whether they are right or wrong." *Citing* 46 Am.Jur.2d *Judges* § 221 (1969). Adverse rulings alone do not support the existence of a disqualifying prejudice. *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct.App. 1992). "Merely because a judge has participated in prior legal proceedings involving related parties or issues does not provide grounds for the judge to recuse himself." *Roselle v. Heirs and Devisees of Archie Grover*, 117 Idaho 530, 534, 789 P.2d 526, 530 (Ct.App. 1990). While Vernon Mortensen appreciates adverse rulings alone do not provide grounds for recusal (Memorandum in Support of Motion to Disqualify, p. 3), much of Vernon Mortensen's memorandum and Affidavit of Terri R. Pickens is focused on precisely that, past decisions

of this Court.

Another way of stating the rule that adverse rulings alone do not support the existence of disqualifying prejudice, is that alleged prejudice must stem from an extra-judicial source. *Department of Health and Welfare v. Doe*, 133 Idaho 826, 829, 992 P.2d 1226, 1229 (Ct.App. 1999) citing *Desfosses*, 120 Idaho 27, 29, 813 P.2d 366, 368. The only extra-judicial source claimed by Vernon Mortensen's counsel is as follows:

b. "Defendant Mortensen has violated the Subdivision Ordinance on prior occasions and has thereby harmed innocent purchasers of property." See p. 18 of Findings 1. This statement is not substantiated by any testimony in the trial transcript, and is a fabrication by counsel for Plaintiffs and adopted by this Court, showing bias against Mortensen.

Affidavit of Terri R. Pickens, p. 2, ¶ 3.b. Vernon Mortensen overlooks the uncontroverted testimony by Scott Rasor, who testified that: defendants violated the subdivision ordinance by splitting it more than four times (Tr. Vol. II, p. 537, L. 24 – p. 538, L. 25); and that defendants violated the subdivision ordinance by doing work first prior to getting an exception, and in so doing, defendants "make the splits first, worry about the rules later", (*Id.*, p. 539, L. 1 – p. 540, L. 1). Rasor also testified that Vernon Mortensen had on prior occasions requested Rasor to make splits that do not conform to the subdivision ordinance, that Rasor had explained to Vernon Mortensen in writing that doing so violated the subdivision ordinance, and that Mortensen persisted in making such divisions which resulted in subsequent purchasers of land from Vernon Mortensen calling Rasor upset about not being able to get building permits because the division was not done up to standard. *Id.*, p. 540, L. 2 – p. 542, L. 11.

This is a discretionary decision by this Court, and this Court must be convinced that he can sit on this case and "...fairly and impartially perform the proper legal analysis which the law requires to be performed." *State v. Pratt*, 128 Idaho 207, 210-11, 912 P.2d

94, 97-98 (1996). This Court is convinced it can do so.

As stated by the Idaho Court of Appeals upholding a denial of a motion for disqualification for cause by a judge: "Suspicion, surmise, speculation, rationalization, conjecture, innuendo, and statements of mere conclusions...may not be substituted for a statement of facts." *Desfosses*, 120 Idaho 27, 30, 813 P.2d 366, 369; *citing Walker v. People*, 126 Colo. 135, 248 P.2d 287, 295 (1952). Much of Vernon Mortensen's arguments are based on an assumption that Vernon Mortensen has already won on all fronts, when the Idaho Supreme Court has at all times sustained this Court's finding that Mortensen did not have a right to use the curved approach.

Vernon Mortensen argues: "In this case, the Idaho Supreme Court suggested in its original decision that this case be reassigned to another district judge." Memorandum in Support of Motion to Disqualify, p. 3. In Pickens' affidavit, counsel for Vernon Mortensen makes the statement: "In the Opinion, the Idaho supreme Court reassigns this case to an alternate judge to make additional findings of fact and conclusions of law consistent with the Opinion." Affidavit of Terri R. Pickens, p. 8, ¶ 16. However, that opinion was withdrawn.

Without a doubt, there is animosity between the parties. There has been no animosity by any party expressed toward the Court. While there may be some animosity by a party toward the Court, that is of no import because: 1) the Court is not aware of such; 2) animosity toward a judge by one of two parties in any litigated proceeding is not uncommon; and 3) most importantly, this Court is not biased against any party even if there is animosity by a party or parties against the Court.

When this case was tried over the span of eighteen trial days which took several months to complete, while the parties had animosities toward each other, the Court perceived no animosities between trial counsel or between trial counsel and the Court.

Since that trial, Whites have hired separate counsel, and now each of the Mortensens have separate counsel. If there are animosities between present counsel and the Court, any such animosity by counsel could only be based upon this Court's decisions following the trial. Accordingly, any animosity by counsel could only have arisen as a result of this litigation, and thus, as set forth above, even if there were prejudice, it would not have stemmed from an extra-judicial source. *Department of Health and Welfare v. Doe*, 133 Idaho 826, 829, 992 P.2d 1226, 1229 (Ct.App. 1999). But more importantly, there is no prejudice. This Court bears no animosity toward any party in this litigation, nor does this Court bear any animosity toward any attorney for a party in this litigation. This Court can unequivocally state this Court will not be biased against Vernon Mortensen, or any other party, or their attorneys, as a result of past conduct within this case. That includes the statements and claims made in this current motion to disqualify.

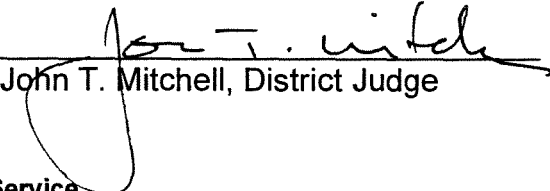
Parties make mistakes, counsel make mistakes, this Court has been reversed in this case. Simply because a party, counsel or this Court makes a mistake, does not mean such mistake is the result of prejudice or creates prejudice. As an example, this Court has shown the claim made by Vernon Mortensen's counsel that: "This statement [by the Court that Mortensen has violated the Subdivision Ordinance on prior occasions and has thereby harmed innocent purchasers of property] is not substantiated by any testimony in the trial transcript, and is a fabrication by counsel for Plaintiffs and adopted by this Court, showing bias against Mortensen", is simply wrong. The fact that Vernon Mortensen's counsel is wrong does not create animosity by the Court toward Vernon Mortensen's attorney. On the other hand, it would be highly inappropriate for this Court to **not** point out that error, simply because there is a possibility that Vernon Mortensen's counsel will later make a claim of animosity by this Court for pointing out that error.

This is not the first motion to disqualify that has been made in this case. Following

remand from the first Idaho Supreme Court decision there was a motion to disqualify made by defendants Whites. The defendants Mortensens joined that motion. That motion was based upon I.R.C.P. 40(d)(1)(F), and the mistaken assumption by the defendants that a new trial was ordered on remand. No new trial was ordered after that first remand back to this Court. The present motion by Vernon Mortensen (joined in by defendants Whites) is made pursuant to I.R.C.P. 40(d)(2), and is for cause. The opinion above indicates why this Court is denying that motion.

IT IS HEREBY ORDERED that defendant Vernon Mortensen's Motion to Disqualify (and defendants Whites' joinder in that motion) is DENIED.

Entered this 1st day of June, 2009.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 1 day of June, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Susan P. Weeks
Dustin Deissner

Fax #
208 664-1684 ✓
509 326-6978 ✓

Lawyer
Robert E. Covington
Terri R. Pickens

Fax #
208 762-4546 ✓
208 954-5099 ✓


Jeanne Clausen, Deputy Clerk

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: *SR* # *54*
2009 JUN 19 PM 3:45

CLERK DISTRICT COURT
William Reed
 DEPUTY

Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure specifically provides that a motion for reconsideration of any interlocutory order of the trial court may be made at any time before entry of final judgment but not later than fourteen (14) days after the entry of final judgment. Idaho courts have repeatedly held that I.R.C.P. 11(a)(2)(B) provides a district court with authority to reconsider and vacate interlocutory orders so long as final judgment has not been entered. *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 784 (2003), citing *Telford v. Neibaur*, 130 Idaho 932, 950 P.2d 1271 (1998); *Sammis v. Magnetek Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997).

Defendant Vernon Mortensen respectfully submits that the Honorable John Mitchell incorrectly determined that there was no extra-judicial source of bias by concluding that Vernon Mortensen violated the Subdivision Ordinance by splitting his property. Judge Mitchell relies exclusively upon the testimony of Scott Rasor to establish the violation of the Subdivision Ordinance.

However, the only testimony advanced by Akers relating to the ordinances came from Scott Rasor, who confirmed on cross-examination that he did not actually know whether or not any ordinances had been violated. The testimony presented at trial confirmed as follows:

Q: Do you know whether or not either of the defendants has made application for a building permit?

A: I don't know that.

Q: Until the county makes a determination of the number of free splits a particular parcel is entitled to is there a violation of the free splits without building house or anything else?

A: Well, if you ask the county that they will say yes, but we all know that properties are bought and sold that don't comply with regulations, and we can buy and sell in Idaho anything we want. **There's nothing prohibiting it.** It's only when the building permit is applied for that you find out whether you have a buildable parcel or not.

Q: Okay. Fair enough. So we don't really know what in this case is going to happen as far as whether or not or how many separate parcels the county is gonna approve for the defendants' 160 acres, do we?

A: Separate parcels under the free split rules?
Q: Yes.
A: We don't. No.

(Tr., Vol. I, p. 553, ll. 1-21) (emphasis added). Because the only testimony relating to this allegation of violation of the Kootenai County Ordinance was hedged on Rasor's testimony, this Court can see that even Rasor admits that he did not know if there was any violation. No other testimony was presented by Akers regarding the alleged violation. Furthermore, Mortensen did not attempt to split his property.

Based on the evidence presented, Defendant Vernon Mortensen respectfully requests for a reconsideration of the Motion to Disqualify.

DATED this 19 day of June, 2009.

PICKENS LAW, P.A.


Terri R. Pickens

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of June, 2009, I caused to be served a true and accurate copy of the foregoing instrument by delivering the same to the following:

Susan P. Weeks
James, Vernon & Weeks P.A.
1626 Lincoln Way
Coeur d'Alene, Idaho 83814

☐ Hand Delivery
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Terri R. Pickens

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CLERK DISTRICT COURT

Patty Benly
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terri@pickenslawboise.com

Attorney for Defendant Vernon J. Mortensen

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife,

Plaintiffs,

vs.

**D.L. WHITE CONSTRUCTION, INC.,
DAVID L. WHITE and MICHELLE V.
WHITE, husband and wife; and VERNON J.
MORTENSEN and MARTI E.
MORTENSEN, husband and wife,**

Defendants.

Case No. CV 02-222

**RESPONSE TO AKERS'
MEMORANDUM IN OPPOSITION FOR
PARTIAL RELEASE OF BOND TO PAY
ATTORNEY'S LIEN**

The foregoing reply is submitted in response to Akers' Memorandum in Opposition for Partial Release of Bond to Pay Attorney's Lien.

I. SPECIFIC STATUTES CONTROL GENERIC STATUTES DEALING WITH THE SAME SUBJECT MATTER.

I.C. §3-205 specifically applies to attorney liens for unpaid fees and therefore, §8-501(1) has no bearing on the issue. “Where both a general statute and a special or specific statute deal with the same subject matter, the provisions of the special or specific statute will control those of

the general statute.” See *Owen v. Burcham*, 100 Idaho 441, 444, 599 P.2d 1012, 1015 (1979); *Arthur v. Shoshone County*, 133 Idaho 854 (Idaho Ct. App. 2000); *Gooding County v. Wybenga*, 137 Idaho 201 (Idaho 2002).

I.C. §3-205, titled **Attorneys’ fees – Lien** provides for an automatic lien upon an attorney’s clients case, from the commencement of the case, against any verdict, report, decision or judgment in his clients favor. Ms. Pickens complied with this statute, and all case law relevant to §3-205, to file the Motion for Partial Release of Bond to Pay Attorney’s Lien. Since I.C. §3-205 **specifically** applies to the matter at hand, the only purpose in introducing another statute to oppose Ms. Pickens’ Motion is to confuse or befuddle this Court.

I.C. §8-501(1) does not apply to this issue, therefore, Ms. Pickens respectfully requests that this Court disregard Akers argument based on I.C. §8-501.

II. STANDING

Additionally, Akers does not have standing to litigate this issue since they do not have standing to oppose the attorney lien issue. To satisfy the case or controversy requirement of standing, a litigant must "allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury." *Young v. City of Ketchum*, 137 Idaho 102, 104 (Idaho 2002).


Akers lacks standing to contest the release of bond issue. They have not been injured, nor will they be injured by the release of the bond. The bond at issue is an appeal bond, filed by Defendants Vernon and Marti Mortensen when seeking an appeal from the trial court’s decision. Since Akers were unsuccessful on the appeal, they do not possess any interest in the bond and the release of the bond to satisfy Ms. Pickens’ attorney lien will not harm their interests in the case.

Additionally, if the Court were to deny Ms. Pickens' Motion for Partial Release of Bond to Pay Attorney Lien, it would not redress any injury to Akers.

Therefore, Ms. Pickens respectfully requests that this Court completely disregard Akers' Memorandum in Opposition to Motion for Partial Release of Bond to Pay Attorney's Lien since they lack standing and has cited a non-applicable statute to support her Memorandum.

DATED this 22 day of June, 2009.

PICKENS LAW, P.A.



Terri R. Pickens

CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of June, 2009, I caused to be served a true and accurate copy of the foregoing instrument by delivering the same to the following:

Susan P. Weeks
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1626 Lincoln Way
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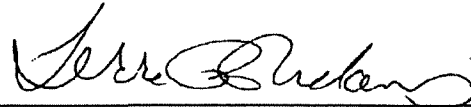
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STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED:

2009 JUN 22 AM 11:13

CLERK DISTRICT COURT

Patricia B. [Signature]
DEPUTY

Attorney for Defendant Vernon J. Mortensen

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.
AKERS, husband and wife,

Plaintiffs,

vs.

D.L. WHITE CONSTRUCTION, INC.,
DAVID L. WHITE and MICHELLE V.
WHITE, husband and wife; and VERNON J.
MORTENSEN and MARTI E.
MORTENSEN, husband and wife,

Defendants.

) Case No. CV 02-222

)
)
) **REPLY IN SUPPORT OF MOTION**
) **TO RELEASE BOND FOR ATTORNEY**
) **FEES LIEN**

DISCUSSION

The foregoing reply is submitted in response to Defendant Marti E. Mortensen's objection to release a portion of the bond proceeds to satisfy the attorney's fees lien filed by counsel for Defendant Vernon J. Mortensen and former counsel for Marti E. Mortensen.

A. Attorney Fee Liens

The attorney's fees lien filed in the above entitled action is valid and enforceable as to the bond proceeds held by this Court in the above referenced matter. Idaho has a statute directly on point:

The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and can not be affected by any settlement between the parties before or after judgment.

I.C. § 3-205. Although there are very few cases in Idaho that discuss this statute, the ones that have been heard in Idaho are directly on point to this case and affirm the validity of the attorney's fees lien in this case. For example, the court held:

The law is well settled that an attorney in asserting a charging lien is entitled to recover against sums which his efforts have brought forth. Various phrasings, the intent of the law on this point is to allow the attorney an interest in the fruits of his skill and labors. The lien secures his right to compensation for obtaining the recovery of "fund" for his client. Of course, where the attorney's efforts are sterile, there would be nothing against which the lien right could be asserted, but where he has produced a fund, he has an equitable interest therein recognized by the lien statute and relevant case law.

The Idaho Code speaks of the lien attaching to "a verdict, report, decision, or judgment on his client's favor and the proceeds thereof in whosoever hands they may come." I.C. § 3-205. Further, this interest cannot be defeated or affected "by any settlement between the parties before or after judgment."

Skelton v. Spencer, 102 Idaho 69, 75 (1981). In addition, the Idaho Court of Appeals confirmed the *Skelton* decision, by adding:

In addition, we note that an attorney is not required to institute an independent action to file an attorney's lien, but can file a notice and a motion to foreclose on that lien in connection with the principal case. *Frazee v. Frazee*, 104 Idaho 463, 464, 660 P.2d 928, 929 (1983). An attorney can seek to enforce an attorney's lien

for payment for services rendered by "petition" in the underlying case. *Skelton v. Spencer*, 102 Idaho 69, 73, 625 P.2d 1072, 1076 (1981).

As in *Gee, supra*, were attorneys forced to maintain a separate legal action to assert and recover upon their liens, the function of the statute would be impaired. Both methods of enforcement, the independent action and the petitioning within the original action, are legitimate courses for attorneys to take in seeking satisfaction upon their statutorily granted liens. *Speiser, supra*, at §§ 16.36, 16.39; 7 Am.Jur.2d §§ 345, 347 (1980); *Tisdale v. Wheeler Bros. Grain Co.*, 599 P.2d 1104 (Okla. 1979); *Earl v. Las Vegas Auto Parts*, 73 Nev. 58, 307 P.2d 781 (1957). *Skelton v. Spencer*, 102 Idaho 69, 73 (Idaho 1981).

Dragotoiu v. Dragotoiu, 133 Idaho 644, 648 (Ct. App. 1998).

There exist two main types of attorney's fees liens, possessory and charging liens. In this case, the lien sought against the bond proceeds is a charging lien. The distinction has been set forth by Idaho courts as follows:

A lien for attorney's fees can be either a possessory or a charging lien. *Nancy Lee Mines, Inc. v. Harrison*, 93 Idaho 652, 471 P.2d 39 (1970). The possessory or retaining lien is of common law origin and allows an attorney to keep possession of documents, money or other property obtained in his professional capacity until he receives payment for his professional services. *Nancy Lee Mines, Inc. v. Harrison, supra*; *Curtis v. Richards*, 4 Idaho 434, 40 P. 57 (1895). Such a retaining lien is passive and not enforceable by foreclosure and sale. *Ross v. Scannell*, 97 Wash.2d 598, 647 P.2d 1004, 1008 (1982); *Midvale Motors, Inc. v. Saunders*, 21 Utah 2d 181, 442 P.2d 938 (1968); S. Speiser, Attorneys' Fees § 16:13 (1973). An attorney's charging lien did not exist in Idaho at common law. *Kerns v. Washington Power Co.*, 24 Idaho 525, 536, 135 P. 70, 73 (1913). See also *Ross v. Scannell, supra*; *Merchants' Protective Association v. Jacobsen*, 22 Idaho 636, 127 P. 315 (1912). However, such has been codified in Idaho by I.C. § 3-205, which provides in pertinent part: "From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and can not be affected by any settlement between the parties before or after judgment."

A charging lien is a lien for the attorney's "services rendered in procuring a judgment, decree, or award for his client, which attaches to the client's cause of action, verdict and judgment and the proceeds thereof" (Speiser, *supra*, at § 16:14; accord, *Ross v. Scannell, supra*; *Nancy Lee Mines, Inc. v. Harrison, supra*), is not dependent upon possession, and is capable of adjudication and enforcement (Speiser, *supra*, at § 16:14).

Frazee v. Frazee, 104 Idaho 463, 465 (1983).

In this case, as counsel for both Defendants Vernon J. Mortensen and Marti E. Mortensen, counsel is entitled to enforce the attorney fees lien filed against the bond proceeds. While not directly adopting the “requisite” for establishing an attorney fees lien as cited by counsel for Marti Mortensen in her Memorandum Opposing Motion to Release Bond (p. 4), the *Skelton* court did affirmatively hold that “an attorney is entitled to assert his lien against the fund which he helped bring into existence.” *Skelton*, 102 Idaho at 76. In this case, the only reason the bond proceeds are available to be returned to the Defendants is a result of the positive outcome on appeal achieved by counsel. Had the appeal gone another way, the bond proceeds would be turned over to Akers in satisfaction of the judgment issued by this Court.

Moreover, it is irrelevant which of the Mortensens actually paid the money for the bond. The bond was posted through counsel for both Vernon and Marti Mortensen on May 11, 2007. (A true and accurate copy of the Notice and Cover Letter is attached hereto as Exhibit “A.”) At that time, the Mortensens were being jointly represented and were jointly responsible for all costs and fees incurred in the action. Current counsel for Marti Mortensen did not appear in the above entitled matter until after the first decision on appeal was rendered. At that time, the attorney fees lien was initially filed with this Court.

After two petitions for rehearing and the motion for disqualification were filed and argued, the attorney fees lien was amended to reflect the subsequent year of activity in the case. In that time, current counsel for Marti Mortensen did not file a single document supporting her position in the matter, but rather relied upon the pleadings filed by counsel for Vernon Mortensen. Not until the Memorandum Opposing Motion to Release Bond has the issue come up that Marti Mortensen is not responsible for the attorney’s fees incurred. She absolutely is

responsible for the fees incurred, jointly and severally with Vernon Mortensen, and the bond proceeds are attached to the action, not the parties. Thus, counsel is entitled to enforce the attorney fees lien against the bond and be paid in the full amount of the charging lien.

B. Joint and Several Liability

Marti Mortensen (“Marti”) was jointly and severally liable with Vernon Mortensen (“Vernon”) for the damages awarded by the trial court, and also jointly and severally liable for the attorney fees incurred in defending the action and pursuing the appeal.

Idaho law applies joint and several liability in two circumstances; (1) where the parties were acting in concert or (2) when a person was acting as an agent or servant of another party. I.C. §6-803(3)&(5). A person is acting in concert with another when pursuing a common plan or design which results in the commission of an intentional or reckless tortious act. *Id.* The damages awarded against Marti and Vernon arose from trespassing and punitive damages, which both require, by definition, intentional or reckless acts.

The main element for an action for a valid trespassing claim is the entering upon the real property of another. I.C. §6-202. Entering is defined as going upon or over real property. I.C. §6-202A. Trespassing requires an intentional action on the part of the trespasser in order to actually enter the real property of another. It cannot be accomplished through negligence. Thus, as an intentional tort, all parties liable for trespassing share the burden by joint and several liability.

By the same logic, all parties against whom punitive damages are assessed share the burden by joint and several liability. I.C. §6-1604 states that an award of punitive damages will be granted where the claimant proves by “clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is

asserted.” *See Todd v. Sullivan Constr. LLC*, 191 P.3d 196 (Idaho 2008). Essentially, the conduct requisite for an award of punitive damages is substantially equal to the elements which demonstrate an intentional or reckless act. Therefore, Vernon and Marti were jointly and severally liable for the punitive damage award.

Since Marti and Vernon were jointly and severally liable for the damages, either one is liable for the entire amount. Joint and several liability provides that when the tortious acts of several parties concurrently cause an injury, each tortfeasor is liable for the whole of the damage *Truck Ins. Exch. v. Bishara*, 128 Idaho 550, 555 (Idaho 1996). *See also Spencer v. Spencer*, 91 Idaho 880, 883 (Idaho 1967) (When tortious acts of several parties concurrently cause an injury, each tort-feasor is liable for the whole damage at the option of the injured party.); *Shields v. Martin*, 109 Idaho 132, 134 (1985) (Joint and several liability “permits the injured party to treat all concerned in the injury jointly and all are liable to respond to the plaintiff in a total sum as damages.”); *Tucker v. Union Oil Co.*, 100 Idaho 590, 599 (Idaho 1979) (Each tortfeasor...remains individually liable for all compensable damages attributable to that injury.”).

Under joint and several liability for the damages awarded by the trial court, either Marti or Vernon is liable for the entire award. Therefore, the bond posted covers the entire damage award. Consequently, the bond is neither Marti’s nor Vernon’s, but rather Marti and Vernon’s. Moreover, as joint defendants with common counsel, Marti and Vernon are jointly responsible for the fees incurred to recover that bond.

This is not a case where Marti had independent counsel during the entire proceedings of this case. To the contrary, she was represented along-side her then-husband, Vernon. The unfortunate fact that the parties were subsequently divorced did not affect the manner in which the appeal was pursued, nor does it affect the requirement that the parties pay the attorney fees

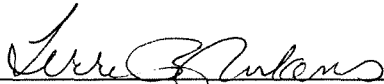
incurred in defending the bond and pursuing the appeal. With the successful outcome on appeal, counsel is entitled to be paid, and if the parties have a dispute about reimbursement among themselves, that issue is more properly addressed in another venue.

CONCLUSION

For the reasons set forth herein, the undersigned respectfully requests that this Court release a portion of the bond proceeds to satisfy the attorney fees lien filed in the above entitled matter in the amount of \$65,505.47.

DATED this 18 day of June, 2009.

PICKENS LAW, P.A.

By: 
Terri R. Pickens, of the firm

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of June, 2009, I caused to be served a true and accurate copy of the foregoing instrument by delivering the same to the following:

Susan P. Weeks
James, Vernon & Weeks P.A.
1626 Lincoln Way
Coeur d'Alene, Idaho 83814

☐ Hand Delivery
☐ U.S. Mail
☐ Overnight Mail
☒ Facsimile (208) 664-1684

Robert E. Covington
8884 N. Government Way, Suite A
Hayden, Idaho 83835


☐ Hand Delivery
☐ U.S. Mail
☐ Overnight Mail
☒ Facsimile (208) 762-4546

Dustin Deissner
Van Camp & Deissner
1707 W. Broadway Ave.
Spokane, WA 99201

☐ Hand Delivery
☐ U.S. Mail
☐ Overnight Mail
☒ Facsimile (509) 326-6978

Vernon J. Mortensen
P.O. Box 330
Naples, ID 83847

☐ Hand Delivery
☒ U.S. Mail
☐ Overnight Mail
☐ Facsimile


Terri R. Pickens

GIVENS PURSLEY LLP

LAW OFFICES
601 W. Bannock Street
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300
WEBSITE: www.givenspursley.com

Terri R. Yost
Direct Line: 388-1232
TerriYost@GivensPursley.com

Gary G. Allen
Peter G. Barton
Christopher J. Beeson
William C. Cole
Michael C. Creamer
Thomas E. Dvorak
Jeffrey C. Fereday
Martin C. Hendrickson
Steven J. Hippler
Debora K. Kristensen
Anne C. Kunkel
Jeremy G. Ladle
Michael P. Lawrence
Franklin G. Lee

David R. Lombardi
John M. Marshall
Kenneth R. McClure
Kelly Greene McConnell
Cynthia A. Melillo
Christopher H. Meyer
L. Edward Miller
Patrick J. Miller
Judson B. Montgomery
Angela K. Nelson
Deborah E. Nelson
W. Hugh O'Riordan, LL.M.
Angela M. Reed
Scott A. Tschirgi, LL.M.

J. Will Varin
Conley E. Ward
Robert B. White
Terri R. Yost

RETIRED
Kenneth L. Pursley
Raymond D. Givens
James A. McClure

August 3, 2007

VIA FEDERAL EXPRESS

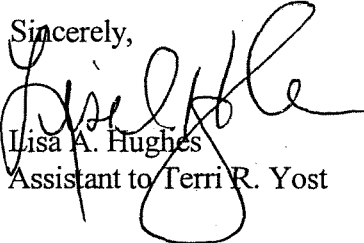
Clerk of the Court
1st Judicial District, Kootenai County
324 W. Garden Street
Coeur d'Alene, ID 83816

Re: *Akers v. Mortensen*; Case No. CV-02-222
Our File No.: 8455-3

Dear Clerk of the Court:

Enclosed please find Notice of Posting Cash Bond with Clerk of Court, along with a check in the amount of \$317,248.97 made payable to Kootenai County Clerk of Court. I have also enclosed a copy to be conformed. Please return the conformed copy in the enclosed self-addressed stamped envelop. Thank you and should you have any questions please give me a call.

Sincerely,


Lisa A. Hughes
Assistant to Terri R. Yost

:lah
Enclosures

SCANNED

0107



THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND • THIS PAPER CONTAINS FLUORESCENT FIBERS AND OTHER SECURITY FEATURES



Sandpoint Title Insurance, Inc.
120 South Second Avenue
Post Office Box 1767, Sandpoint, Idaho 83864

PANHANDLE STATE BANK
SANDPOINT, ID 83864

7324

92-360-1231

8/02/2007

\$ 317,248.97

DATE

AMOUNT

PAY THREE HUNDRED SEVENTEEN THOUSAND TWO HUNDRED FORTY EIGHT AND 97/100 DOLLARS

TO THE Kootenai County Clerk Of Court
ORDER OF

ESCROW FUNDS

A handwritten signature in black ink, appearing to read 'Kathleen M. [unclear]', is written over a horizontal line. Below this line is another horizontal line.

File No.: 51285-NA

Account No.:

⑈ 7324 ⑈ ⑆ 123103606 ⑆ 1332948 ⑈

TerriYost@GivensPursley.com

Attorney for Defendants Mortensen

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife,

Plaintiffs,

VS.

D.L. WHITE CONSTRUCTION, INC.,
DAVID L. WHITE and MICHELLE V.
WHITE, husband and wife; and VERNON J.
MORTENSEN and MARTI E.
MORTENSEN, husband and wife,

Defendants.

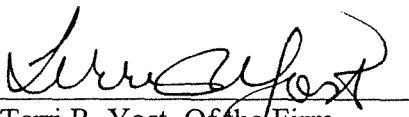
Case No. CV 02-222

NOTICE OF POSTING CASH BOND WITH CLERK OF COURT

PLEASE TAKE NOTICE That Defendants Vernon J. Mortensen and Marti E. Mortensen, by and through their attorney of record, Terri R. Yost, of the firm Givens Pursley LLP have posted a cash bond in the amount of \$317,248.97 with the Clerk of the District Court of Kootenai County pursuant to Idaho Appellate Rule 13(b)(13) for the purpose of providing to Plaintiffs security for payment of the judgment entered against said Defendants in the above entitled matter.

DATED This 11 day of May, 2007.

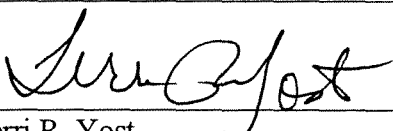
GIVENS PURSLEY, LLP

By: 
Terri R. Yost, Of the Firm
Attorney for Defendants Mortensen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11 day of May 2007, a true and correct copy of the foregoing document was served as follows:

Leander James James, Vernon & Weeks, PA 1875 North Lakewood Drive, Suite 200 Coeur d'Alene, ID 83814	<input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Facsimile (208) 664-1684 <input type="checkbox"/> Overnight Delivery
Robert E. Covington 8884 North Government Way, Suite A Hayden, ID 83835	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Facsimile (208) 762-4546 <input type="checkbox"/> Overnight Delivery


Terri R. Yost

From: Origin ID: BOIA (208)388-1200
Lisa Hughes
Givens Pursley
601 W Bannock

Boise, ID 83702



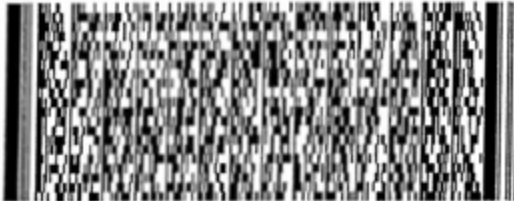
CL889286702923

SHIP TO: (208)446-1160

BILL SENDER

Clerk of the Court
Kootenai County Court
324 W. Garden

Coeur d'Alene, ID 83816



Ship Date: 03AUG07
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System#: 1037556/INET7061
Account#: S *****

Delivery Address Bar Code



Ref # 8455-3
Invoice #
PO #
Dept #

TRK# 7923 9034 1564
0201

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DSR

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83816



Shipping Label: Your shipment is complete

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3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

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RESULT	OK

Terri R. Yost/ISB #5828
Givens Pursley, LLP
601 W. Bannock St.
P.O. Box 2720
Boise, Idaho 83701
Telephone: (208) 388-1200
Facsimile: (208) 388-1300
TerriYost@GivensPursley.com

Attorney for Defendants Mortensen

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife,

Plaintiffs,

VS.

D.L. WHITE CONSTRUCTION, INC.,
DAVID L. WHITE and MICHELLE V.
WHITE, husband and wife; and VERNON J.
MORTENSEN and MARTI E.
MORTENSEN, husband and wife,

Defendants.

Case No. CV 02-222

NOTICE OF POSTING CASH BOND WITH CLERK OF COURT

PLEASE TAKE NOTICE That Defendants Vernon J. Mortensen and Marti E. Mortensen, by and through their attorney of record, Terri R. Yost, of the firm Givens

FILED

6/30/09

AT

6:30

O'clock

P

M

CLERK OF DISTRICT COURT

Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.
AKERS, husband and wife,,

Plaintiffs,

vs.

D.L. WHITE CONST., INC., DAVID L.
WHITE and MICHELLE WHITE, husband
and wife, and VERNON J. MORTENSEN
and MARTI E. MORTENSEN, husband and
wife,

Defendants.

Case No. **CV 2002 222**

**MEMORANDUM DECISION AND
ORDER ON DEFENDANT VERNON
MORTENSEN'S MOTION FOR
RECONSIDERATION OF DENIAL OF
DEFENDANT VERNON
MORTENSEN'S MOTION TO
DISQUALIFY**

Defendant Vernon J. Mortensen on May 4, 2009, filed a "Motion to Disqualify" the undersigned pursuant to I.R.C.P. 40(d)(2). No hearing was noticed by Vernon Mortensen.

Because the rule requires a hearing, and since the mere filing of such a motion divests a court of taking any other action in a case until a motion to disqualify is decided, on May 6, 2009, this Court noticed up oral argument on the motion for May 21, 2009. At oral argument, Defendant Vernon J. Mortensen's Motion to Strike Plaintiff's Memorandum in Response to V.J. Mortensen's Motion to Disqualify for Cause was denied, and the Court considered all pleadings submitted on this motion to disqualify. At oral argument on the motion to disqualify, counsel for defendant Vernon J. Mortensen rested on the pleadings, counsel for defendant D.L. White had submitted no written pleading but

argued in favor of Vernon J. Mortensen's motion to disqualify, counsel for defendant Marti E. Mortensen was present but did not take a position on the motion to disqualify, and counsel for plaintiffs argued against the motion to disqualify. At the conclusion of oral argument, the Court took the matter under advisement to re-read past decisions of this Court in this case, and to re-read the decisions of the Idaho Supreme Court in this case, all with an eye toward Vernon Mortensen's claims in his motion to disqualify.

The motion to disqualify claimed this Court is biased or prejudiced against Vernon J. Mortensen. In his brief, Vernon Mortensen states "...Mortensen firmly believes that this Court is no longer capable of being fair and impartial enough to follow the Idaho Supreme Court's directives on remand." Memorandum in Support of Motion to Disqualify, pp. 1-2.

On June 1, 2009, this Court filed its Order on Defendant Vernon Morentsen's Motion to Disqualify, and Denied said motion and also denied defendant Whites' joinder in that motion. On June 19, 2009, defendant Vernon Mortensen filed his "Motion for Reconsideration of Defendant's Motion to Disqualify." In that Motion for Reconsideration of Defendant's Motion to Disqualify, Vernon Mortensen did not request oral argument. Defendant Vernon Mortensen did not notice up for hearing his Motion for Reconsideration of Defendant's Motion to Disqualify. The Court, on its own, set aside an hour for a status conference on June 30, 2009. Because this Court had concerns that a Motion to Reconsider a Motion to Disqualify might pose the same divesting of jurisdiction problems (and might pose the same requirement for a hearing) that a motion to disqualify poses in the first instance, the Court asked counsel for Vernon Mortensen to present oral argument on June 30, 2009. Counsel for defendants Whites took no position on the Motion for Reconsideration, and filed no pleading joining or opposing Vernon Mortensen's Motion for Reconsideration. Counsel for plaintiffs presented argument opposing the Motion for Reconsideration. At the conclusion of oral argument, this Court denied Vernon

Mortensen's Motion for Reconsideration of Defendant's Motion to Disqualify. That then allowed the Court to hear oral argument on defendant Vernon Mortensen's Motion for Partial Release of Bond to Satisfy Attorney Fees Lien, and counsel for defendant Vernon Mortensen's Motion to Withdraw as Attorney of Record for defendant Vernon Mortensen. At the conclusion of oral argument on both of those motions, both motions were taken under advisement. This Court now explains the reasons for its denial of Vernon Mortensen's Motion for Reconsideration of Defendant's Motion to Disqualify.

In defendant Vernon Mortensen's Motion for Reconsideration of Defendant's Motion to Disqualify, the only reason stated was: "...the Court was in error by determining that Defendant Mortensen split the property in violation of the Subdivision Ordinance." Motion for Reconsideration of Defendant's Motion to Disqualify, p. 1. The Court has reviewed the portion of the transcript attributed to Scott Rasor, cited by defendant Vernon Mortensen in his Motion for Reconsideration of Defendant's Motion to Disqualify. *Id.*, pp. 2-3. Such portion of Scott Rasor's testimony does nothing to change this Court's reasoning, when it wrote in its June 1, 2009, "Order on Defendant Vernon Morentensen's Motion to Disqualify:

Another way of stating the rule that adverse rulings alone do not support the existence of disqualifying prejudice, is that alleged prejudice must stem from an extra-judicial source. *Department of Health and Welfare v. Doe*, 133 Idaho 826, 829, 992 P.2d 1226, 1229 (Ct.App. 1999) citing *Desfosses*, 120 Idaho 27, 29, 813 P.2d 366, 368. The only extra-judicial source claimed by Vernon Mortensen's counsel is as follows:

b. "Defendant Mortensen has violated the Subdivision Ordinance on prior occasions and has thereby harmed innocent purchasers of property." See p. 18 of Findings 1. This statement is not substantiated by any testimony in the trial transcript, and is a fabrication by counsel for Plaintiffs and adopted by this Court, showing bias against Mortensen.

Affidavit of Terri R. Pickens, p. 2, ¶ 3.b. Vernon Mortensen overlooks the uncontroverted testimony by Scott Rasor, who testified that: defendants violated the subdivision ordinance by splitting it more than four times (Tr.

Vol. II, p. 537, L. 24 – p. 538, L. 25); and that defendants violated the subdivision ordinance by doing work first prior to getting an exception, and in so doing, defendants “make the splits first, worry about the rules later”, (*Id.*, p. 539, L. 1 – p. 540, L. 1). Rasor also testified that Vernon Mortensen had on prior occasions requested Rasor to make splits that do not conform to the subdivision ordinance, that Rasor had explained to Vernon Mortensen in writing that doing so violated the subdivision ordinance, and that Mortensen persisted in making such divisions which resulted in subsequent purchasers of land from Vernon Mortensen calling Rasor upset about not being able to get building permits because the division was not done up to standard. *Id.*, p. 540, L. 2 – p. 542, L. 11.

Order on Defendant Vernon Morentensen's Motion to Disqualify, p. 4. The entire testimony of Scott Rasor was taken into consideration by this Court in deciding the motion to disqualify. The above quoted portion of the Order on Defendant Vernon Mortensen's Motion to Disqualify, should be kept in context of the pertinent portion of that decision, which reads in its entirety:

In the most recent opinion of the Idaho Supreme Court, filed January 22, 2009, this Court was affirmed in its decision that Appellants (the defendants collectively) do not have an implied easement by prior use and that the appellants' prescriptive easement is 12.2 feet in width. The Idaho Supreme Court reversed this Court judgment as to the location of that part of the prescriptive easement located in Parcel B, the award of damages and the award of attorney's fees and costs. Slip Opinion, pp. 6, 13. Specifically, the Idaho Supreme Court affirmed this Court in its finding that the location of appellants' prescriptive easement across the Akers' property was coextensive with the express easement in Government Lot 2, but held this Court erred when it found that appellants' prescriptive easement turned immediately south upon entering Parcel B. *Id.*, pp. 10-12. The Idaho Supreme Court held: “However, these exhibits, which are aerial photographs of the relevant property, indicate that the access road historically made a more gradual turn resembling a shepherd's crook rather than a 90-degree turn.” *Id.*, p. 11. The Idaho Supreme Court further held:

In light of this photographic evidence, we conclude that there is not substantial evidence supporting the district court's conclusion as to the location of Appellants' prescriptive easement on Parcel B. This issue must be remanded back to the district court for additional fact finding consistent with this opinion.

Id., p. 12. The Idaho Supreme Court then held: “Because the district court must determine the location of Appellants' prescriptive easement in Parcel B on remand, we vacate the district court's award of damages below based upon trespass.” *Id.* Finally, as to damages awarded by the district court for

negligent infliction of emotional distress and punitive damages, because those damages are “inseparable from consideration of Appellants’ easement rights”, those damages were vacated. *Id.*, p. 13.

On remand, the directive by the Idaho Supreme Court as to further action by this Court is limited. This Court must locate the prescriptive easement, only on Parcel B, as it follows the path of a shepherd’s crook as opposed to a 90 degree bend. Once so located, this Court must also determine if there was a trespass, and if there was, determine damages. No new evidence was ordered to be taken, and no party has requested new evidence be taken.

The Idaho Court of Appeals held in *Desfosses v. Desfosses*, 120 Idaho 27, 30, 813 P.2d 366, 369 (Ct.App. 1991), “A disqualifying prejudice cannot be deduced from adverse rulings by a judge, whether they are right or wrong.” *Citing* 46 Am.Jur.2d *Judges* § 221 (1969). Adverse rulings alone do not support the existence of a disqualifying prejudice. *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct.App. 1992). “Merely because a judge has participated in prior legal proceedings involving related parties or issues does not provide grounds for the judge to recuse himself.” *Roselle v. Heirs and Devisees of Archie Grover*, 117 Idaho 530, 534, 789 P.2d 526, 530 (Ct.App. 1990). While Vernon Mortensen appreciates adverse rulings alone do not provide grounds for recusal (Memorandum in Support of Motion to Disqualify, p. 3), much of Vernon Mortensen’s memorandum and Affidavit of Terri R. Pickens is focused on precisely that, past decisions of this Court.

Another way of stating the rule that adverse rulings alone do not support the existence of disqualifying prejudice, is that alleged prejudice must stem from an extra-judicial source. *Department of Health and Welfare v. Doe*, 133 Idaho 826, 829, 992 P.2d 1226, 1229 (Ct.App. 1999) citing *Desfosses*, 120 Idaho 27, 29, 813 P.2d 366, 368. The only extra-judicial source claimed by Vernon Mortensen’s counsel is as follows:

b. “Defendant Mortensen has violated the Subdivision Ordinance on prior occasions and has thereby harmed innocent purchasers of property.” See p. 18 of Findings 1.

This statement is not substantiated by any testimony in the trial transcript, and is a fabrication by counsel for Plaintiffs and adopted by this Court, showing bias against Mortensen.

Affidavit of Terri R. Pickens, p. 2, ¶ 3.b. Vernon Mortensen overlooks the uncontroverted testimony by Scott Rasor, who testified that: defendants violated the subdivision ordinance by splitting it more than four times (Tr. Vol. II, p. 537, L. 24 – p. 538, L. 25); and that defendants violated the subdivision ordinance by doing work first prior to getting an exception, and in so doing, defendants “make the splits first, worry about the rules later”, (*Id.*, p. 539, L. 1 – p. 540, L. 1). Rasor also testified that Vernon Mortensen had on prior occasions requested Rasor to make splits that do not conform to the subdivision ordinance, that Rasor had explained to Vernon Mortensen in writing that doing so violated the subdivision ordinance, and that Mortensen persisted in making such divisions which resulted in subsequent purchasers of land from Vernon Mortensen calling Rasor upset

about not being able to get building permits because the division was not done up to standard. *Id.*, p. 540, L. 2 – p. 542, L. 11.

This is a discretionary decision by this Court, and this Court must be convinced that he can sit on this case and "...fairly and impartially perform the proper legal analysis which the law requires to be performed." *State v. Pratt*, 128 Idaho 207, 210-11, 912 P.2d 94, 97-98 (1996). This Court is convinced it can do so.

As stated by the Idaho Court of Appeals upholding a denial of a motion for disqualification for cause by a judge: "Suspicion, surmise, speculation, rationalization, conjecture, innuendo, and statements of mere conclusions...may not be substituted for a statement of facts." *Desfosses*, 120 Idaho 27, 30, 813 P.2d 366, 369; *citing Walker v. People*, 126 Colo. 135, 248 P.2d 287, 295 (1952). Much of Vernon Mortensen's arguments are based on an assumption that Vernon Mortensen has already won on all fronts, when the Idaho Supreme Court has at all times sustained this Court's finding that Mortensen did not have a right to use the curved approach.

Vernon Mortensen argues: "In this case, the Idaho Supreme Court suggested in its original decision that this case be reassigned to another district judge." Memorandum in Support of Motion to Disqualify, p. 3. In Pickens' affidavit, counsel for Vernon Mortensen makes the statement: "In the Opinion, the Idaho supreme Court reassigns this case to an alternate judge to make additional findings of fact and conclusions of law consistent with the Opinion." Affidavit of Terri R. Pickens, p. 8, ¶ 16. However, that opinion was withdrawn.

Without a doubt, there is animosity between the parties. There has been no animosity by any party expressed toward the Court. While there may be some animosity by a party toward the Court, that is of no import because: 1) the Court is not aware of such; 2) animosity toward a judge by one of two parties in any litigated proceeding is not uncommon; and 3) most importantly, this Court is not biased against any party even if there is animosity by a party or parties against the Court.

When this case was tried over the span of eighteen trial days which took several months to complete, while the parties had animosities toward each other, the Court perceived no animosities between trial counsel or between trial counsel and the Court. Since that trial, Whites have hired separate counsel, and now each of the Mortensens have separate counsel.

If there are animosities between present counsel and the Court, any such animosity by counsel could only be based upon this Court's decisions following the trial. Accordingly, any animosity by counsel could only have arisen as a result of this litigation, and thus, as set forth above, even if there were prejudice, it would not have stemmed from an extra-judicial source. *Department of Health and Welfare v. Doe*, 133 Idaho 826, 829, 992 P.2d 1226, 1229 (Ct.App. 1999). But more importantly, there is no prejudice. This Court bears no animosity toward any party in this litigation, nor does this Court bear any animosity toward any attorney for a party in this litigation. This Court can unequivocally state this Court will not be biased against Vernon Mortensen, or any other party, or their attorneys, as a result

of past conduct within this case. That includes the statements and claims made in this current motion to disqualify.

Parties make mistakes, counsel make mistakes, this Court has been reversed in this case. Simply because a party, counsel or this Court makes a mistake, does not mean such mistake is the result of prejudice or creates prejudice. As an example, this Court has shown the claim made by Vernon Mortensen's counsel that: "This statement [by the Court that Mortensen has violated the Subdivision Ordinance on prior occasions and has thereby harmed innocent purchasers of property] is not substantiated by any testimony in the trial transcript, and is a fabrication by counsel for Plaintiffs and adopted by this Court, showing bias against Mortensen", is simply wrong. The fact that Vernon Mortensen's counsel is wrong does not create animosity by the Court toward Vernon Mortensen's attorney. On the other hand, it would be highly inappropriate for this Court to **not** point out that error, simply because there is a possibility that Vernon Mortensen's counsel will later make a claim of animosity by this Court for pointing out that error.

This is not the first motion to disqualify that has been made in this case. Following remand from the first Idaho Supreme Court decision there was a motion to disqualify made by defendants Whites. The defendants Mortensens joined that motion. That motion was based upon I.R.C.P. 40(d)(1)(F), and the mistaken assumption by the defendants that a new trial was ordered on remand. No new trial was ordered after that first remand back to this Court. The present motion by Vernon Mortensen (joined in by defendants Whites) is made pursuant to I.R.C.P. 40(d)(2), and is for cause. The opinion above indicates why this Court is denying that motion.

IT IS HEREBY ORDERED that defendant Vernon Mortensen's Motion to Disqualify (and defendants Whites' joinder in that motion) is DENIED.

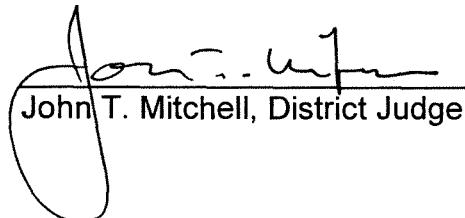
Entered this 1st day of June, 2009.

John T. Mitchell, District Judge

For the above stated reasons, defendant Vernon Mortensen's Motion for Reconsideration of Defendant's Motion to Disqualify must be denied.

IT IS HEREBY ORDERED defendant Vernon Mortensen's Motion for Reconsideration of Defendant's Motion to Disqualify is DENIED.

Entered this 30th day of June, 2009.


John T. Mitchell, District Judge

Certificate of Service


I certify that on the 30 day of June, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Susan P. Weeks
Dustin Deissner

Fax #
208 664-1684 ✓
509 326-6978 ✓

Lawyer
Robert E. Covington
Terri R. Pickens

Fax #
208 762-4546 ✓
208 954-5099 ✓


Jeanne Clausen, Deputy Clerk

FILED 7/8/09

AT 2:00 O'Clock P M
CLERK OF DISTRICT COURT

[Signature]
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.
AKERS, husband and wife,,

Plaintiffs,

vs.

D.L. WHITE CONST., INC., DAVID L.
WHITE and MICHELLE WHITE, husband
and wife, and VERNON J. MORTENSEN
and MARTI E. MORTENSEN, husband and
wife,

Defendants.

Case No. **CV 2002 222**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT
VERNON MORTENSEN'S MOTION
FOR PARTIAL RELEASE OF BOND
TO SATISFY ATTORNEY FEES LIEN**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

On May 20, 2009, Terri Pickens, counsel for defendant Vernon J. Mortensen, filed a "Motion for Partial Release of Bond to Satisfy Attorney Fees Lien", and a "Second Amended Notice of Attorney Lien" in the amount of \$65,505.47. No brief was filed in support of that motion. That motion contained no rule or statutory basis in support of that motion. On that same date, May 20, 2009, counsel for defendant Vernon J. Mortensen also filed a "Motion to Withdraw as Attorney of Record." Neither motion was noticed up by Vernon J. Mortensen's attorney.

Following the filing of the Remittitur by the Idaho Supreme Court, on June 1, 2009, the Court scheduled a status conference to be held on June 30, 2009. On June 11,

2009, defendant Marti Mortensen filed a "Memorandum Opposing Motion for Release Bond for Attorney's Lien." On June 17, 2009, plaintiffs Akers filed a "Memorandum in Opposition to Motion for Partial Release of Bond to Pay Attorney's Lien." On June 22, 2009, counsel for Vernon J. Mortensen filed two briefs, the first, dated June 18, 2009, entitled "Reply in Support of Motion to Release Bond for Attorney Fees Lien" (responding to Marti Mortensen's opposition), and the second entitled "Response to Akers' Memorandum in Opposition for Partial Release of Bond to Pay Attorney's Lien."

Earlier, on May 4, 2009, Vernon J. Mortensen filed a "Motion to Disqualify" the undersigned pursuant to I.R.C.P. 40(d)(2). No hearing on that motion was noticed by counsel for Vernon J. Mortensen. Because I.R.C.P. 40(d)(2) requires a hearing, and since the mere filing of such a motion divests a court of taking any other action in a case until a motion to disqualify is decided, on May 6, 2009, this Court noticed up oral argument on the motion for May 21, 2009. At the conclusion of oral argument, the Court took the matter under advisement to re-read past decisions of this Court in this case, and to re-read the decisions of the Idaho Supreme Court in this case, all with an eye toward Vernon J. Mortensen's claims in his motion to disqualify. On June 1, 2009, this Court filed its Order on Defendant Vernon Morentsen's Motion to Disqualify, and denied said motion and also denied defendant Whites' joinder in that motion. On June 19, 2009, defendant Vernon J. Mortensen filed his "Motion for Reconsideration of Defendant's Motion to Disqualify." In that Motion for Reconsideration of Defendant's Motion to Disqualify, Vernon J. Mortensen did not request oral argument. Counsel for Vernon J. Mortensen did not notice up for hearing his Motion for Reconsideration of Defendant's Motion to Disqualify. Because this Court had concerns that a Motion to Reconsider a Motion to Disqualify might pose the same divesting of jurisdiction problems (and might pose the

same requirement for a hearing) that a motion to disqualify poses in the first instance, the Court, *sua sponte*, utilized the time the Court had previously set aside for a status conference on June 30, 2009, to provide time for oral argument by counsel for Vernon J. Mortensen to present oral argument on her client's Motion for Reconsideration of Defendant's Motion to Disqualify. At that hearing, counsel for defendants Whites took no position on the Motion for Reconsideration, and filed no pleading joining or opposing Vernon J. Mortensen's Motion for Reconsideration. Counsel for plaintiffs presented argument opposing the Motion for Reconsideration. At the conclusion of oral argument, this Court denied Vernon J. Mortensen's Motion for Reconsideration of Defendant's Motion to Disqualify, but stated on the record a written ruling would detail the reasons for that decision. On June 30, 2009, this Court entered its "Memorandum Decision and Order on Defendant Vernon Mortensen's Motion for Reconsideration of Denial of Defendant Vernon Mortensen's Motion to Disqualify."

Having ruled on Vernon J. Mortensen's Motion for Reconsideration of Defendant's Motion to Disqualify at oral argument on June 30, 2009, that then allowed the Court to hear (due to curing any jurisdictional problem from the motion to reconsider the motion to disqualify) oral argument on defendant Vernon J. Mortensen's Motion for Partial Release of Bond to Satisfy Attorney Fees Lien, and counsel for defendant Vernon J. Mortensen's Motion to Withdraw as Attorney of Record for defendant Vernon J. Mortensen. At the conclusion of oral argument on both of those motions, both motions were taken under advisement. The Court granted Terri Pickens, presently counsel for Vernon J. Mortensen, seven additional days to submit an affidavit or other evidence showing that either one of her clients at the time (Vernon J. Mortensen and Marti Mortensen), agreed to have Pickens' attorney fees taken from the cash appeal bond. Seven days have

passed as of the date of this opinion, and no submissions have been filed. I.R.C.P. 6(a).

II. ANALYSIS.

This matter was appealed to the Idaho Supreme Court. At the time it was appealed, this Court had entered judgment in favor of the plaintiffs, the Akers, and against all defendants. In order to appeal, a party against whom judgment has been entered must post a cash deposit or supersedeas bond in the amount of 136% of the judgment amount. I.A.R. 13(b)(15). Terri Pickens, counsel for Vernon J. Mortensen, requests part of the bond posted by her client for the appeal be paid over to her to satisfy her attorney fees lien in the amount of \$65,505.47.

The purpose of the bond was to provide to "Plaintiffs security for payment of the judgment entered against said Defendants in the above entitled matter." Notice of Posting Cash Bond With Clerk of Court, Reply in Support of Motion to Release Bond for Attorney Fees Lien, Exhibit A. That Notice of Posting Cash Bond With Clerk of Court indicates that both defendants "Vernon J. Mortensen and Marti E. Mortensen, by and through their attorney of record, Terri R. Yost (now Pickens), of the firm Givens Pursley LLP (now with Pickens Law) have posted a cash bond in the amount of \$317,248.97, with the clerk of the District Court of Kootenai County..."

The applicable statute is Idaho Code § 3-205

ATTORNEYS' FEES -- LIEN. The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, *which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come*; and can not be affected by any settlement between the parties before or after judgment.

I.C. § 3-205. (emphasis added). Thus, Pickens has a lien on her client's cause of action,

and that lien attaches to the Idaho Supreme Court's decision, which was entered in her client Vernon J. Mortensen's favor, in part. The next question is, does Pickens lien attach to the cash bond on appeal?

Defendant Marti Mortensen raises the following arguments, none of which are supported by affidavit:

This is a case that started while Jerry Mortensen and Mari Mortensen were still married. They retained Terri Pickens at that time, but Mortensens have since divorced. Ms. Pickens no longer represents Ms. Mortensen and Ms. Mortensen was of the belief that Ms. Pickens' bills were paid current through about 2 years ago.

A cash appeal Bond was posted in this matter by Marti Mortensen on 08/07/2007 (Receipt 756456 Dated 8/7/2007) for \$317,248.97. These funds were supplied by Marti Mortensen, after the effective date of her divorce, and thus are separate property. Appeal was heard in this matter by the Idaho Supreme Court filed 6/10/2008 resulting a remittitur of the case to the District Court.

In this case the money that Ms. Pickens seeks to attach her lien against, is a bond posted by Marti Mortensen, which is being returned to her after not being levied against on appeal.

The money, then, is not the proceeds of a "verdict, report, decision or judgment" in the sense that Ms. Pickens' efforts did not secure that money for Ms. Mortensen: it was Ms. Mortensen's money in the first place, which was merely posted as surety and returned when no longer needed.

Memorandum Opposing Motion to Release Bond for Attorney's Lien, pp. 2-3. Even though Marti Mortensen's positions are not supported by an affidavit, Vernon J. Mortensen bears the burden of production and persuasion on this issue, since it is his attorney's motion. Counsel for Vernon J. Mortensen has done nothing to show that it was Vernon J. Mortensen who posted the cash bond. Instead, Vernon J. Mortensen's attorney argues:

Moreover, it is irrelevant which of the Mortensens actually paid the money for the bond. The bond was posted through counsel for both Vernon and Marti Mortensen on May 11, 2007. (A true and accurate copy of the Notice and Cover Letter is attached hereto as Exhibit "A.") At that time, the Mortensens were being jointly represented and were jointly responsible for

all costs and fees incurred in the action. Current counsel for Marti Mortensen did not appear in the above entitled matter until after the first decision on appeal was rendered. At that time, the attorneys fees lien was initially filed with this Court.

Reply in Support of Motion to Release Bond for Attorney Fees Lien, p. 4.

While the genesis of the cash bond certainly raises issues, the dispositive issue is whether the cash bond does or does not satisfy Idaho Code § 3-205. Pickens clearly has a lien "...upon his [her] client's cause of action or counterclaim,..." but that lien upon Vernon J. Mortensen's cause of action does not attach "...to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come..." While the Idaho Supreme Court's decision in this case was a "decision" which was in part in Ms. Pickens' client's favor, the cash bond is not in any way the "proceeds" of that decision. Under Idaho Code § 3-205, Pickens is not entitled to enforce her attorney lien upon the cash bond.

There are additional reasons the requirements for a charging lien have not been met. "The law is well settled that an attorney in asserting a charging lien is entitled to recover against sums which his [her] efforts have brought forth." *Skelton v. Spencer*, 102 Idaho 69, 75, 625 P.2d 1072, 1078 (1981). The Idaho Supreme Court in *Skelton* cited with approval, *Almi, Inc. v. Dick Corp.*, 31 Pa.Cmwlth. 26, 375 A.2d 1343 (1977), which in turn quoted from the Pennsylvania Supreme Court decision of *In Recht v. Clairton Urban Redevelopment Authority*, 402 Pa. 599, 608, 168 A.2d 134, 138-39 (1961). That quote noted by the Idaho Supreme Court in *Skelton* is as follows:

...the Pennsylvania Supreme Court, after an extensive review of the case law, determined the requisites of an attorney's charging lien to be:

(1) That there is a fund in court or otherwise available for distribution on equitable principles, (2) that the services of the attorney operated substantially or primarily to secure the fund out of which he seeks to be paid, (3) that it was agreed that counsel look to the fund rather than the client for his [her] compensation, (4) that the lien claimed is limited to

costs, fees or other disbursements incurred in the litigation by which the fund was raised and (5) that there are equitable considerations which necessitate the recognition and application of the charging lien.

102 Idaho 69, 76, 625 P.2d 1072, 1079. In the present case, criteria two and three are not met. The services of Vernon J. Mortensen's attorney did not "substantially or primarily secure the fund out of which [Pickens] seeks to be paid". The cash bond was paid out of Marti Mortensen's own pocket, or the combined pocket of the marital estate of Vernon J. and Marti Mortensen. The cash bond had to be paid by one or both of them in order for the Mortensens to maintain their appeal. Pickens' services had nothing to do with the creation of or securing of that fund. As to item three, Pickens made the representation at oral argument that Vernon J. Mortensen agreed that Pickens could look to that fund rather than to Vernon J. Mortensen for her compensation for attorney's fees. Pickens also stated to the Court that Idaho State Bar counsel agreed with Pickens that she could look to this cash bond for her lien. This Court gave Pickens seven additional days after oral argument within which to file an affidavit or affidavits regarding those claims by Pickens. Even though Pickens is an officer of the Court, those claims would be hearsay, and accordingly, those claims would not properly be before the Court. Pickens has not filed any submissions since oral argument.

At oral argument, Pickens argued that these criteria from *Almi* discussed in *Skelton* were not adopted by the Idaho Supreme Court in *Skelton*. This Court disagrees. The Idaho Supreme Court specifically stated: "Though this court has never specified the requisites for enforcement of a charging lien in such a manner, the similarity of the situation makes the *Almi* case persuasive, and certainly Rigby & Thatcher could meet the requirements there set forth." 102 Idaho 69, 76, 625 P.2d 1072, 1079.

In *Frazee v. Frazeee*; *Reeves v. Frazee*, 104 Idaho 463, 660 P.2d 928 (1983), an

attorney instituted a petition for a charging lien. Reeves, an attorney, represented Mrs. Frazee during her divorce from Mr. Frazee. Reeves sought a lien on Mr. Frazee's property, for his legal services incurred for his wife. The district court denied such lien and the Idaho Supreme Court affirmed. In discussing *Skelton*, the Idaho Supreme Court in *Frazee* held:

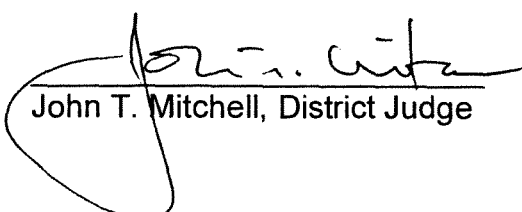
In sum, an attorney's charging lien is not passive as is the possessory or retaining lien. A charging lien is only brought about by some affirmative act of the party asserting the lien in reducing it to a judgment or order of the court. We note the difference in the instant case from the situation in *Skelton v. Spencer, supra*. There a "fund" was in existence representing the sums that the attorney had obtained for his client. Here no such "fund" existed, since the moneys had already been paid to the client. Again, we note that since Reeves had immediately withdrawn as attorney, no authority existed to pay him any sum of money on behalf of his erstwhile client.

104 Idaho 463, 466, 660 P.2d 928, 931. The same problems are in place in the present case. No act of Pickens caused the cash bond to come into existence. Pickens did not obtain those funds for her clients; they were her clients' funds to begin with.

For the above stated reasons, defendant Vernon J. Mortensen's Motion for Partial Release of Bond to Satisfy Attorney Fees Lien must be denied.

IT IS HEREBY ORDERED defendant Vernon J. Mortensen's Motion for Partial Release of Bond to Satisfy Attorney Fees Lien is DENIED. Following the filing of this Order, the Court will enter and file the Order allowing Terri Pickens to withdraw as counsel for Vernon J. Mortensen.

Entered this 8th day of July, 2009.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 8 day of July, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Susan P. Weeks
Dustin Deissner

Fax #
208 664-1684 ✓
509 326-6978 ✓

Lawyer
Robert E. Covington
Terri R. Pickens

Fax #
208 762-4546 ✓
208 954-5099 ✓



Jeanne Clausen, Deputy Clerk

2009 JUL -8 PM 2: 04

Terri R. Pickens/ISB #5828
Pickens Law, P.A.
398 South 9th, Suite 240
P.O. Box 915
Boise, ID 83701
Telephone: (208) 954-5090
Facsimile: (208) 954-5099
terri@pickenslawboise.com

CLERK DISTRICT COURT
Michael Christensen
DEPUTY

Attorney for Defendant Vernon J. Mortensen

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.
AKERS, husband and wife,

Plaintiffs,

vs.

D.L. WHITE CONSTRUCTION, INC.,
DAVID L. WHITE and MICHELLE V.
WHITE, husband and wife; and VERNON J.
MORTENSEN and MARTI E.
MORTENSEN, husband and wife,

Defendants.

Case No. CV 02-222

**ORDER GRANTING MOTION TO
WITHDRAW AS ATTORNEY OF
RECORD**

THIS MATTER, having come before the Court on the 30th day of June, 2009, on Counsel's Motion to Withdraw, the Court having read and considered said Motion and the Affidavit in support, and it appearing that there is good and sufficient cause to grant the same;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. That the above-named law firm of Terri R. Pickens is granted leave to withdraw as attorney of record for the Defendant, VERNON J. MORTENSEN.

ORDER GRANTING MOTION TO WITHDRAW AS ATTORNEY OF RECORD - 1

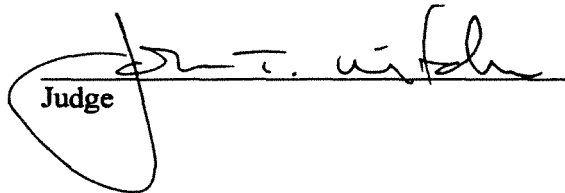
2. That Defendant appoint another attorney to appear, or that Defendant appears in person by filing a written notice with the Court stating how Defendant will proceed without an attorney, within twenty (20) days from the date of service or mailing of this order.

3. That the withdrawing attorney shall forthwith, with due diligence, serve copies of this order upon Defendant and all other parties, and shall file proof of service with the Court.

4. That the withdrawing attorney may make such service upon Defendant by personal service or by certified mail to Defendants' last known address most likely to give notice to Defendants for a period of twenty (20) days after service or mailing of this order.

5. That if Defendant fails to file and serve additional written appearance in the action either in person or through a newly appointed attorney within the twenty (20) day period, such failure shall be sufficient ground for entry of default and default judgment against Defendant without further notice.

DATED this 8th day of July, 2009


Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of July, 2009, I caused to be served a true and accurate copy of the foregoing instrument by delivering the same to the following:

Susan P. Weeks
James, Vernon & Weeks P.A.
1626 Lincoln Way
Coeur d'Alene, Idaho 83814

☐ Hand Delivery
☐ U.S. Mail
☐ Overnight Mail
☒ Facsimile (208) 664-1684

Robert E. Covington
8884 N. Government Way, Suite A
Hayden, Idaho 83835

☐ Hand Delivery
☐ U.S. Mail
☐ Overnight Mail
☒ Facsimile (208) 762-4546

Dustin Deissner
Van Camp & Deissner
1707 W. Broadway Ave.
Spokane, WA 99201

☐ Hand Delivery
☐ U.S. Mail
☐ Overnight Mail
☒ Facsimile (509) 326-6978

Vernon J. Mortensen
P.O. Box 330
Naples, ID 83847

☐ Hand Delivery
☒ U.S. Mail
☐ Overnight Mail
☐ Facsimile

Terri R. Pickens
Pickens Law, P.A.
P.O. Box 915
Boise, ID 83701

☐ Hand Delivery
☐ U.S. Mail
☐ Overnight Mail
☒ Facsimile (208) 954-5099


Clerk

Vernon Jerry Mortensen

PO Box 330 Naples Idaho 83847

Telephone: 208 946 8275

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 1

2009 JUL 24 PM 4:39

CLERK DISTRICT COURT
Sharon Reed
DEPUTY

Pro se

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DENNIS LYLE AKERS and SHERRIE L.	)	case No. CV-2002-222
AKERS, husband and wife.)	
Plaintiffs	)	NOTICE OF APPEARANCE
Vs.)	
D.L. WHITE CONSTUCTION, INC.,)	
DAVID L WHITE and MICHELLE V.)	
WHITE, husband and wife; and VERNON J.)	
MORTENSEN and MARTI E)	
MORTENSEN, husband and wife,)	
Defendants)	

This court having granted a motion for Terri R Pickens to withdraw as Vernon J Mortensen's attorney, Vernon J Mortensen hereby gives notice to this court that he will forthwith appear pro se in this matter.

Date 7/24/09

A handwritten signature in cursive script, reading "Vernon J Mortensen", written over a horizontal line.

Vernon J Mortensen

Pro se

CERTIFICATE OF SERVICE

Vernon J Mortensen certifies: I have on this date served the foregoing document upon the following parties by US mail 1st class postage prepaid:

Leander James, Susan Weeks, Vernon & Weeks, P.A. 1626 Lincoln Way
Coeur d' Alene , Idaho 83814

Robert Covington, 8884 N. Government Way, Suite A, Hayden, Idaho
83835

p. 3

Dustin Deissner, Van Camp & Deissner, 1707 W. Broadway Ave.,
Spokane Washington 99201.

Dated 7/24/09

Vernon J. Mortensen
Vernon J Mortensen

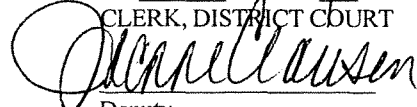
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STATE OF IDAHO)
County of KOOTENAI) ss

FILED

10/8/09

AT 5:00 O'Clock P M
CLERK, DISTRICT COURT


Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**DENNIS LYLE AKERS AND SHERRIE L.
AKERS, HUSBAND AND WIFE,,**

Plaintiff,

vs.

**D.L. WHITE CONST., INC., DAVID L.
WHITE AND MICHELLE WHITE,
HUSBAND AND WIFE, AND VERNON J.
MORTENSEN AND MARTI MORTENSEN,**
Defendants.

Case No. **CV 2002 222**

**ORDER FOR MEDIATION,
and ORDER FOLLOWING
STATUS CONFERENCE**

This action is before the Court on remand from the Idaho Supreme Court. At the October 8, 2009, status conference, the Court established a deadline of October 22, 2009, for simultaneous briefing submitted by all parties as to who has the burden of proof on issues before the Court on remand. Absent agreement by the parties, oral argument on the burden of proof will be held on November 30, 2009, at 4:00 p.m. At the status conference, it was apparent to the Court that pursuant to I.R.C.P. 16(k), it is an appropriate case for mediation.

IT IS THEREFORE ORDERED that:

1. The parties and counsel shall in good faith mediate this matter until it is either

resolved or the mediator determines the matter is at an impasse. The parties shall AS SOON AS POSSIBLE MEET AND CONFER and by no later than 5:00 p.m. on October 22, 2009, have agreed upon the mediator, and immediately notify the Court as to the identity of the agreed upon mediator. If the parties are unable to agree, the parties shall submit a joint letter to the court by no later than 5:00 p.m. on October 22, 2009, signed by all parties or their counsel, informing the Court as to the fact that they could not agree, and the Court will appoint a mediator the following day.

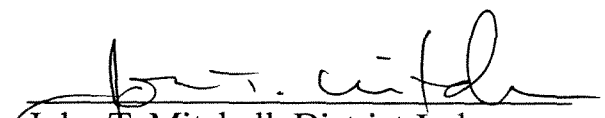
2. The parties shall provide to the mediator such information, position statements or settlement materials as requested by the mediator.
3. The mediation must be completed no later than November 30, 2009.
4. Each counsel shall have his or her client (or a representative of such client having full settlement authority) present at the scheduled mediation so that the possibility of settlement may be fully explored.
5. The parties shall pay a pro rata share of the costs of the mediator. I.R.C.P. 16(k)(8).
6. If resolution or partial resolution is accomplished the resolution must at a minimum be placed on the record. The preferred alternative is a written agreement signed by the parties is filed with the Court. In any dispute involving real property, the agreed upon settlement terms must be set forth in writing, signed by the parties and filed with the Court (a statement on the record is

insufficient).

7. Failure to comply with this Order for Mediation may result in the imposition of sanctions, including without limitation those identified in I.R.C.P. 16(i).

IT IS FURTHER ORDRED that by no later than October 22, 2009, each party shall submit briefing as to who has the burden of proof on issues before the Court on remand. Absent agreement by the parties, oral argument on the burden of proof will be held on November 30, 2009, at 4:00 p.m.

Dated this 8th day of October, 2009.


John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 9 day of October, 2009 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:


Susan P. Weeks
208 664-1684 ✓

Robert E. Covington
208 762-4546 ✓

Dustin Deissner
509 326-6978 ✓

Vernon Jerry Mortensen
P.O. Box 330
Naples, ID 83847

Mld

By 
Jeanne Clausen, Secretary

ROBERT E. COVINGTON
Attorney at Law
8884 North Government Way
Suite A
Hayden, ID 83835
Tel: 208-762-4545
Fax: 208-762-4546
ISB # 2312

Attorney for D.L. White Construction, Inc.,
David L. White and Michelle V. White

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED: 194

2009 OCT 22 PM 4: 34

CLERK DISTRICT COURT

Cherry Huff
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.)
AKERS, husband and wife,)
)
Plaintiffs,)
)
vs.)
)
D.L. WHITE CONSTRUCTION, INC.,)
DAVID L. WHITE and MICHELLE V. WHITE,)
Husband and wife; VERNON J. MORTENSEN)
And MARTI E. MORTENSEN, husband and)
Wife,)
)
Defendants.)

Case No. CV-02-222

BRIEF OF
DEFENDANTS WHITE
RE: PROOF OF EASEMENT
LOCATION

Come now D. L. White Construction, Inc., David L. White and Michelle V. White,
hereinafter "Whites", to submit to the Court their brief as ordered by the Court on the topic
of burden of proof in establishing and describing the precise location of the prescriptive
easement crossing Parcel B as referenced by the Supreme Court in its decision filed on
January 22, 2009.

After reviewing the relevant case law, Whites submit that based solely upon the
record that is present in this case a sufficient description of the route and course of the area
of the easement is not satisfactorily determinable. Whites submit that if the parties are

unable to stipulate to a sufficient description of the easement area in Parcel B, that further testimony should be heard by the Court on the subject of a metes and bounds description of the affected area. In a similar situation, the Supreme Court has previously remanded for determination an issue of the same nature through the taking of additional testimony if deemed necessary. Sinnett v. Werelius, 83 Idaho 514 (1961). Whites submit that formulation of a description by the Court without the benefit of a metes and bounds description will not achieve the necessary certainty of the precise course of the travel way.

As an alternative, Whites note for the Court that Plaintiffs Exhibit 6, and testimony in support thereof by Scott Razor, depict the graveled surface in Parcel B that had been present prior to 2002. The Court could order a survey to provide a metes and bounds description of that area to accomplish a sufficient description of the origin and course of the easement area.

After determination of the location of the easement, damages issues could be addressed. Whites join with Akers in proposing that Akers file an initial brief on damages. Whites would then file their brief in response and Akers would then file their reply.

Dated this 22nd day of October, 2009.


Robert Covington
Attorney for Whites

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Defendants White was served on October 22, 2009 by facsimile transmission to:

Brief of Defendants White

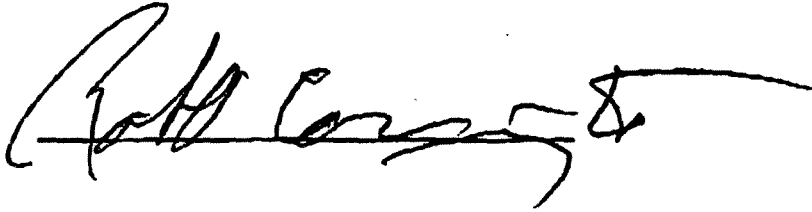
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**Dustin Deissner
Van Camp & Diessner
1707 W. Broadway Avenue
Spokane, WA 99201
509-326-6978**

**Susan Weeks
James, Vernon & Weeks
1626 Lincoln Way
Coeur d'Alene, ID 83814
208-664-1684**

And by U.S. Mail to:

**Vernon J. Mortensen
PO Box 330
Naples, ID 83847**

A handwritten signature in black ink, appearing to read "Vernon J. Mortensen", with a long horizontal line extending to the right.

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED 179

2009 OCT 22 PM 4:19

CLERK DISTRICT COURT
Paul Chung
DEPUTY

Dustin Deissner
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1707 W. Broadway Ave.
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Attorneys for Plaintiff
Marti Mortensen

THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L. AKERS,)
husband and wife,)
Plaintiffs,)

v.)
VERNON J. MORTENSEN and MARTI E.)
MORTENSEN, husband and wife,)
Defendants,)

and)
D.L. WHITE CONSTRUCTION, INC., DAVID L.)
WHITE and MICHELLE V. WHITE, husband and)
wife,)
Defendants.)

Case No. CV-2002-222

DENNIS LYLE AKERS and SHERRIE L. AKERS,)
husband and wife,)
Plaintiffs,)

MEMORANDUM RE:
BURDEN OF PROOF BY
MARTI MORTENSEN

v.)
D.L. WHITE CONSTRUCTION, INC., DAVID L.)
WHITE and MICHELLE V. WHITE, husband and)
wife,)
Defendants,)

and)
VERNON J. MORTENSEN and MARTI E.)
MORTENSEN, husband and wife,)
Defendants.)

MEMORANDUM RE: BURDEN OF
PROOF BY MARTI MORTENSEN

MARTI MORTENSEN submits the following memorandum regarding burdens of proof.

1. Location of Easement

Burden of proof as to the exact location of the easement is largely irrelevant. The Supreme Court in the Akers II decision found that an easement was present, did cross AKERS's property and found,

[T]he access road historically made a more gradual turn resembling a shepherd's crook rather than a 90-degree turn. Defendant's Exhibit 41, an aerial photograph from 1978 also shows that the access road made a gradual turn through Parcel B before entering Parcel A. Perhaps most telling is Plaintiff's Exhibit 253, which is a photograph of the shared boundary between Government Lot 2, Parcel B, and Parcel A, and the Quonset hut on Parcel A.

This court appears to be required only to make a finding as to where that 'shepard's crook' shaped road in Plaintiff's Exhibit 253 actually lies.

2. Damages

AKERS will have the burden to show damages.

- **Trespass**

The Supreme Court ruled in *Akers II*

Without a determination of Appellants' easement rights, it is impossible to determine the scope of Appellants' trespass. Therefore, we vacate the district court's award of damages for negligent infliction of emotional distress and remand the issue for further determination after the district court determines Appellants' easement rights. For the same reason, we vacate the district court's award of punitive damages in favor of the Akers.

There may have been no trespass at all: there was in fact an easement, 12.2 feet wide following the 'shepard's crook' pathway, and WHITE and MORTENSEN had the right to use that path. AKERS must show any trespass damages occurred outside of that path. If the record is insufficient to determine that Defendant's acts occurred outside the scope of the easement, then AKERS has failed its burden of proof.

- **Treble Damages**

Treble damages are allowed only as to those damages caused by trespass, again, off the easement. AKERS may only treble those damages actually incurred.

- **Emotional damages**

AKERS must show now that the actions causing emotional damage involved a breach of duty, i.e., not staying within the easement. Additionally and more difficult for Plaintiffs, there must be proof of actual physical injury or manifestation to the plaintiff caused by the specific conduct. *Curtis v. Firth*, 123 Idaho 598, 850 P.2d 749 (1993); *Windsor v. Guarantee Trust Life Ins. Co.*, 684 F.Supp. 630, 632 (D.Idaho 1988). AKERS must show the causal connection from any specific conduct that exceeded the scope of actions allowed under the easement, and the emotional distress.

- **Punitive Damages**

An award of punitive damages will be sustained only when it is shown that the defendant acted in a manner that was "an extreme deviation from reasonable standards

of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences." *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983). Since it turns out there was in fact an easement, AKERS must show that any actions taken by WHITE and MORTENSEN were knowingly done outside the scope of that easement. Since the exact location was difficult to determine, proof of intent should be essentially impossible.

- **Punitive Damages Allocable to MARTI MORTENSEN**

MARTI MORTENSEN will argue that punitive damages incurred by VERNON MORTENSEN are not allocable to the wife under Community Property principles. She accepts the burden of proof for this argument.

- **Attorneys Fees**

AKERS brought several causes of action but did not prevail on all of them. Their entitlement to attorneys fees flows from IRC 6-202 and applies only to those fees incurred to enforce the trespass provisions of that statute.

Bumgarner v. Bumgarner, 124 Idaho 629, 862 P.2d 321 (1993) recognizes that fees must be apportioned:

Gary is correct with respect to his assertion that where the parties have succeeded on entirely separate claims, those claims are properly distinguished and should be analyzed separately in determining whether attorney fees are appropriate. . . . We also note, however, that the trial court is authorized to award attorney fees only as provided by statute or contract. . . . In this case, the court based its award of fees on I.C. § 6-202. That statute, which applies to claims for intentional and wilful trespass, mandates an award of reasonable attorney fees in an action "brought to

enforce the terms of this act if the plaintiff prevails." Id. As applied to the case at hand, this statute authorized the district court to award fees only to Kent, "the plaintiff" in that action, and then to award only those fees reasonably incurred in prosecuting the trespass action upon which he prevailed. Hence, even though the court found that Gary had prevailed on some of the claims asserted, it found no statutory basis upon which he would be entitled to any offsetting award.

Consequently, and contrary to Gary's position, there was no basis for the court to apportion fees between the parties. Rather, the court was required to award Kent his full reasonable attorney fee attributable to his successful trespass claim. It is clear from the district court's memorandum opinion and order awarding attorney fees that the court considered the fact that a substantial amount of Kent's efforts were directed at claims upon which he did not prevail, specifically citing Kent's claim for trespass to the beach end of his property and Kent's claim for emotional distress. The court found, however, that some of the legal work performed on those claims overlapped with Kent's successful claim for trespass to the west end of his lot, and that Kent was entitled to recover those fees. . . . Based upon its findings, which Gary does not dispute here, the court allocated one-half of all Kent's attorney fees, or \$18,532.75, to the prosecution of the successful trespass claim. Upon this record, we conclude that the district court acted within the boundaries of its discretion and consistent with the legal standards applicable to its decision.

The burden to allocate fees must fall to AKERS as the party claiming fees.

CONCLUSION

The Court should determine the correct location of hte easement without reference to burden of proof.

The Court should require AKERS to meet the burden of proof as to all aspects of the damages awarded, save as to MARTI MORTENSEN's claim regarding community liability.

October 22, 2009



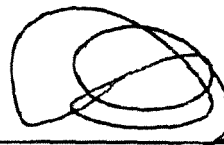
Dustin Deissner
Attorney for Marti Mortensen

CERTIFICATE OF SERVICE

Dustin Deissner certifies: I have on this date served the foregoing document upon the following parties by the following means:

TO:	BY:
VERNON J. MORTENSEN PO BOX 1922 BONNERS FERRY ID 83805	<input checked="" type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input type="checkbox"/> Facsimile to:
Robert Covington, 8884 N Government Way, Ste A Hayden, ID 83835	<input type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: 208-762-4546
Leander James Susan Weeks James, Vernon & Weeks, P. A. 1626 Lincoln Way Coeur d'Alene, ID 83814	<input type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: (208) 664-1684

Dated October 22, 2009



Dustin Deissner

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: 10/30/09

2009 OCT 30 PM 4:55

CLERK DISTRICT COURT
DEPUTY *Sherry Duffin*

Vernon Jerry Mortensen
Pro Se
PO Box 330
Naples, Idaho, 83847
Tel: 208-946- 8275
Email: jerrymortensen@hotmail.com

Pro Se

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO AND FOR THE COUNTY OF KOOTENAI**

DENNIS LYLE AKERS and	)	Case No. CV-02-222
SHERRIE L AKERS, husband	)	BRIEF OF
And wife.	)	DEFENDANT VERNON J
Plaintiffs,	)	MORTENSEN

Vs.)	RE: BURDEN OF PROOF OF
-----	---	------------------------

D.L. WHITE CONSTRUCTION	)	EASEMENT LOCATION
INC., DAVID L. WHITE and)	

MICHELLE V. WHITE,)
Husband and wife; Vernon)
J MORTENSEN AND MARTI)
E. MORTENSEN)
Defendants)

10/30/2008 10:30 AM EVOLVED
Comes now Vernon Jerry Mortensen pro se and argues as follows:

Defendants should bear the burden of proving the exact location of the easement road rather than Plaintiffs because Plaintiffs', Akers, previous testimony upon which this Court relied is the reason for the remand. Akers testimony was deemed by the Supreme Court to not be credible.

While all witnesses, with the exception of Akers, described a road crossing Akers land exclusively with adequate curvature at both ends of the road to allow farm equipment to trail behind a tractor or truck, Plaintiff, Dennis Akers claimed the entirety of the road was not even on his land; that the final western end of the road crossed into Bill Reynolds' land before entering Defendants', Mortensen and White's land; Dennis Akers stuck with that version of the road even though Bill Reynolds, Akers' witness, testified the access road never entered his land.

In addition, Dennis Akers testified that there was no curvature at either end of the easement road; that both incorporated 90 degree turns.

With the first remand Akers conceded that the access road was located entirely on his property but claimed the west end turned 90 degrees into a cliff leaving that version of the road unusable. Plaintiffs were still land locked.

Judging from the history of this case, it would be a fair guess that if it were Akers burden to prove the exact location of the access road, Akers would again argue for an impassible route and in so doing distort the facts and merely create confusion.

The primary task at hand is to establish the exact rout of the access road; a route that existed before Akers purchased the land through

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with the road passed; thus to determine the exact route requires additional fact finding. Expert testimony will be required to identify the necessary curvature to allow equipment to be trailed up the access road. The fact that equipment was trailed up the road was established in the Court record. At the present time the general description of the road provides no curvature to allow turns. As such the road has no utility.

In addition and more importantly, there needs to be expert testimony by surveyors and experts knowledgeable about aerial photos that can establish an exact mathematical metes and bounds description of the road visible in the 1974 aerial photo and described by the Supreme Court as following the curvature of a Sheppard's crook. The Supreme Court found that aerial photo along with Richard Peplinski's testimony to be credible. However without a precise mathematical description of the access road, its path will always be contestable.

The existence of an easement is no longer an issue; the task at hand is to establish its route. The directive of the Supreme Court is to establish the route of the access road and then to establish damages, "if any". It is Vernon J. Mortensens contention that there should be no damages since Defendants always had an easement and did nothing more than try and exercise their right of access, an access that has been denied them for eight years. Furthermore this Court instructed plaintiffs that Defendants were to be allowed to use the existing road until the exact location of the easement was established, Plaintiffs, Akers, blocked that access and Defendants simply drove around Akers' blockades using the disputed triangle area, property that at that time had not been adjudicated to belong to Akers.

**1707 W. Broadway Avenue
Spokane, WA 99201
509- 326-6978**

**Susan Weeks
James, Vernon and Weeks
1626 Lincoln Way
Coeur d' Alene, ID 83814
2008-664-1684**

Burden of proof

STATE OF IDAHO)
County of KOOTENAI) ss

FILED 12-1-09

AT 5:00 O'Clock PM
CLERK, DISTRICT COURT

Donna Clauson
Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**DENNIS LYLE AKERS AND SHERRIE L.
AKERS, HUSBAND AND WIFE,,**

Plaintiff,

VS.

**D.L. WHITE CONST., INC., DAVID L.
WHITE AND MICHELLE WHITE,
HUSBAND AND WIFE, AND VERNON J.
MORTENSEN AND MARTI MORTENSEN,**

Defendants.

Case No. **CV 2002 222**

**ORDER REGARDING
BURDENS OF PROOF, and
ORDER ESTABLISHING
BRIEFING SCHEDULE ON
EASEMENT LOCATION**

This action is before the Court on remand from the Idaho Supreme Court. At the October 8, 2009, status conference, the Court established a deadline of October 22, 2009, for simultaneous briefing submitted by all parties as to who has the burden of proof on issues before the Court on remand. Absent agreement by the parties, oral argument on the burden of proof would be held on November 30, 2009. There was no such agreement, and oral argument was held on November 30, 2009. Counsel submitted briefs on behalf of their parties, and defendant Vernon J. Mortensen file a brief *pro se*. At oral argument, all counsel argued. Defendant Vernon J. Mortensen did not appear at oral argument.

0153

The Court having reviewed the briefing and having heard oral argument;

IT IS HEREBY ORDERED that:

- 1) Plaintiff has the burden of proof on all damage issues.
- 2) No additional evidence regarding location of the easement is needed, however, a metes and bounds description of the location as found by the Court will be necessary to comply with Idaho case law.
- 3) The defendants have the burden of going forward (burden of production) and the burden of persuasion (burden of proof) as to the location of the easement. *Palmer v. Fitzpatrick*, 97 Idaho 925, 927, 557 P.2d 203, 205 (1976). While the parties continue to negotiate an agreed location of the easement, the following applies absent that agreement.
- 4) Each defendant will submit a brief regarding location of the easement, with reference to specific exhibits in evidence and specific reference to previous decisions of this Court or the Idaho Supreme Court, and such brief shall be due on or before January 15, 2009.

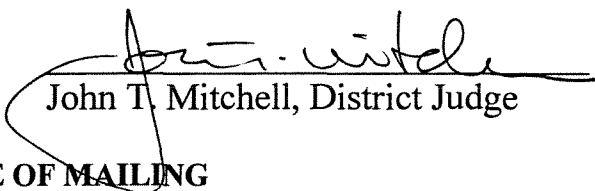
The plaintiffs shall then submit a brief regarding location of the easement, with reference to specific exhibits in evidence and specific reference to previous decisions of this Court or the Idaho Supreme Court, and such briefs shall be due on or before January 22, 2009.

Each defendant shall then submit a response brief, if any, by no later than January 29, 2009, regarding location of the easement.

Each party is encouraged (but not required) to submit a metes and bounds description of their claim as to the location of the easement, along with their briefing.

5) Once the Court determines the location of the easement (or the parties advise the Court that they have stipulated by agreement the location of the easement), the Court will establish a briefing schedule regarding the issue of damages.

Dated this 1st day of December, 2009.


John T. Mitchell, District Judge

CERTIFICATE OF MAILING

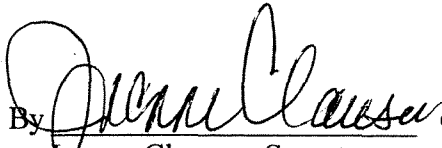
I hereby certify that on the 2 day of December, 2009 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Susan P. Weeks
208 664-1684 ✓

Robert E. Covington
208 762-4546 ✓

Dustin Deissner
509 326-6978 ✓

Vernon Jerry Mortensen
P.O. Box 330
Naples, ID 83847 *mla*

By 
Joanne Clausen, Secretary

0155

FILED 1/8/10

AT 2:00 O'Clock P. M
CLERK OF DISTRICT COURT

Michael Clausen
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.)
AKERS, husband and wife,,)

Plaintiffs,)

vs.)

D.L. WHITE CONST., INC., DAVID L.)
WHITE and MICHELLE WHITE, husband)
and wife, and VERNON J. MORTENSEN)
and MARTI E. MORTENSEN, husband and)
wife,)

Defendants.)

Case No. **CV 2002 222**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT
MARTI MORTENSEN'S MOTION TO
ORDER TRANSFER OR RELEASE
OF BOND**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

On November 23, 2009, defendant Marti Mortensen, through counsel, filed a "Motion to Order Transfer or Release of Bond", a "Memorandum Supporting Motion to Transfer of Release Bond", and an "Affidavit of Marti Mortensen Supporting Motion to Release Bond." On December 22, 2009, defendant Vernon Mortensen, pro se, filed a "combination" pleading entitled "Brief in Opposition of Releasing Mortensen Bond Money From the Court, Sworn Affidavit of Vernon J Mortensen Included." On December 29, 2009, oral argument was held on Marti Mortensen's Motion to Order Transfer or Release of Bond. At the conclusion of oral argument, the matter was taken under advisement.

II. ANALYSIS.

This matter was appealed to the Idaho Supreme Court. At the time it was appealed, this Court had entered judgment in favor of the plaintiffs, the Akers, and against all defendants. In order to appeal, a party against whom judgment has been entered must post a cash deposit or supersedeas bond in the amount of 136% of the judgment amount. I.A.R. 13(b)(15).

As previously decided by this Court:

The purpose of the bond was to provide to "Plaintiffs security for payment of the judgment entered against said Defendants in the above entitled matter." Notice of Posting Cash Bond With Clerk of Court, Reply in Support of Motion to Release Bond for Attorney Fees Lien, Exhibit A. That Notice of Posting Cash Bond With Clerk of Court indicates that both defendants "Vernon J. Mortensen and Marti E. Mortensen, by and through their attorney of record, Terri R. Yost (now Pickens), of the firm Givens Pursley LLP (now with Pickens Law) have posted a cash bond in the amount of \$317,248.97, with the clerk of the District Court of Kootenai County..."

Memorandum Decision and Order Denying Defendant Vernon Mortensen's Motion for Partial Release of Bond to Satisfy Attorney Fees Lien, (filed July 8, 2009), p. 4.

This matter is now before this Court on remand from the Idaho Supreme Court for fact-finding only on the location of the prescriptive easement. On October 8, 2009, this Court held a status conference and all parties requested the opportunity to present briefing on the issue of which party carries the burden of proof with regard to the prescriptive easement issue on remand from the Supreme Court. The Court granted this request. At present, the only issues remaining are: (1) the location of the prescriptive easement and (2) any award, if appropriate, of damages and attorney fees. Each party has submitted briefing. This Court entered its Order on the Burdens of Proof on December 1, 2009; ordering: Plaintiffs carry the burden on all damages issues; a metes and bounds description of the easement location will be necessary; and the

defendants carry the burden of production and burden of proof as to the location of the easement.

A. Idaho Appellate Rule 13(b)(15) Requires Release of the Cash Appeal Bond.

In her brief, Marti Mortensen (Marti) requests the Court release the appeal bond to her directly or to the Boundary County Court under her pending divorce action there. Memorandum Supporting Motion to Transfer or Release Bond, p. 2. Marti makes this argument pursuant to Idaho Appellate Rule 13(b)(15). Marti argues there is no judgment to stay at this juncture and requests the Court return her money to her. *Id.*, p. 3. Marti also argues the bond money amount is traceable only to her, despite her concession that the bond was posted for the benefit of both her and Vernon Mortensen (Vernon). *Id.*, p. 4. As such, Marti claims interpleader of the bond amount in the pending divorce action between Marti and Vernon would be proper. *Id.*, p. 3, citing I.C. § 8-701.

In response, Vernon Mortensen (Vernon) argues the money was posted for the benefit of both he and Marti and should not be released absent an agreement of both. Brief in Opposition to Releasing Mortensen bond Money from the Court, p. 2. Vernon notes Marti has not pointed to any possible harm resulting from the bond monies remaining with this Court until a final determination in the *Akers v. White, et al.* matter. *Id.*

Marti cites Idaho Appellate Rule 13(b). Idaho Appellate Rule 13(b) uses permissive, not mandatory, language to allow the district court to rule on certain motions "...during the *pendency* of an appeal." The appeal in this case is no longer pending. The appeal is complete. The case is remanded back to district court. However, subsection 15 of that rule allows the district court the discretion to take certain

action after the appeal is over. Subsection 15 reads in part: "If the district court stays execution or enforcement of a money judgment upon the posting of a cash deposit or supersedeas bond, the court may, upon motion or application, cause or direct any judgment lien filed to be released." Subsection 15 continues: "If the appellate court has vacated any money judgment and remanded only for a determination of the amount of the judgment, the district court may continue or modify the amount of any cash deposit or supersedeas bond posted in connection with the appeal". I.A.R. 13(b)(15).

Here, the case was remanded on the issue of location of the easement. 2009 Opinion No. 6, Substitute Opinion, (January 22, 2009), p. 12. This Court has since ordered, while defendants collectively carry the burden on the location of the easement, plaintiffs carry the burden of demonstrating any claimed damages. Order Regarding Burdens of Proof and Order Establishing Briefing Schedule on Easement Location, p. 2.

More importantly, for purposes of Marti's Motion to Order Transfer or Release of Bond, the Idaho Supreme Court also "vacated" the district court's "...award of damages..." 2009 Opinion No. 6, Substitute Opinion, (January 22, 2009), pp. 12. Again, the pertinent portion of I.A.R. 13(b)(15) reads: "If the appellate court has vacated any money judgment and remanded only for a determination of the amount of the judgment, the district court may continue or modify the amount of any cash deposit or supersedeas bond posted in connection with the appeal." While the first portion of that sentence (If the appellate court has vacated any money judgment...) has occurred, the second portion of that sentence (...*and* remanded only for a determination of the amount of the judgment...), has not occurred. I.A.R. 13(b)(15). (emphasis added) The italicized "and" shows that both are necessary. Both: 1) vacation of any money judgment by the appellate court *and* 2) a remand by the appellate court only for a

determination of the amount of that money judgment, are necessary, in order for the district court to exercise its discretion to "...continue...the amount of any cash deposit...posted in connection with the appeal." I.A.R. 13(b)(15). The remand in this case was for more than the determination of the amount of the money judgment, because the money judgment was vacated, the matter was remanded for this Court to determine the location of the easement, and upon determining the location of the easement, the issue of damages must be revisited. In that redetermination it could be there are no money damages, less money damages than previously awarded or more money damages than previously awarded. But at the present time, the money damage award by this Court is *vacated*. That award ceases to exist. From that standpoint alone, logically, there is no reason for the appeal bond to remain. From the standpoint of construction of I.A.R. 13(b)(15), because the remand was for more than the determination of the amount of that money judgment, this court lacks the discretion to continue the cash deposit posted. Arguably, this Court has no discretion to do anything other than return the cash deposit.

Having found the cash appeal bond must be released, the next question is: "To whom?"

**B. The Cash Appeal Bond is to be Interplead in
Boundary County Case No. CV 2006 224.**

Marti argues if the cash appeal bond is released, it should be released to her. Memorandum Supporting Motion to Transfer or Release Bond, pp. 4-5. Alternatively, Marti argues the cash appeal bond should be interplead into the Boundary County Case No. CV 2006 224. Memorandum Supporting Motion to Transfer or Release Bond, pp. 3-4.

Supporting her claim that the cash appeal bond should be released directly to

her, Marti argues the funds for that cash appeal bond are traceable to her.

Memorandum Supporting Motion to Transfer or Release Bond, pp. 4-5. By affidavit,

Marti states she has been divorced from Vernon, and

“...an interlocutory decree [Exhibit 1] awarded certain property to me, including property known as Twin Rivers Ranch, still subject to mortgages.

That land was quite-claimed by VERNON MORTENSEN to me as my sole and separate property. [Exhibit 2]

I then sold that property and instructed the escrow company at closing to pay the amount of \$317,248.97 to the Kootenai County Clerk for an appeal bond. [Exhibit 3].

Affidavit of Marti Mortensen Re: Bond, p. 2. The attached exhibits bear out Marti's claims. Vernon fails to provide any proof to contradict those claims. However, Vernon claims the Boundary County divorce action remains pending due to a remand by District Judge Steve Verby on appeal from Magistrate Judge Justin Julian's decision. Brief Opposing Releasing Mortensen Bond Money From the Court, pp. 1-8. While Vernon's argument is unsupported by law, there are two difficulties that prevent this Court at this time from returning this cash appeal bond directly to Marti. First, there is *at least* uncertainty as to the *present* status of that Boundary County divorce action. No direct evidence as to the current status of that case has been presented to the Court, only a December 22, 2006 "Order Re: Stipulated Motion to Approve Community Property Settlement Agreement" has been presented. Affidavit of Marti Mortensen Re: Bond, p. 2, Exhibit 1. Second, Vernon's Brief Opposing Releasing Mortensen Bond Money From the Court makes several claims regarding the genesis of those funds and the current status of those funds vis-a-vis the divorce. Brief Opposing Releasing Mortensen Bond Money From the Court, pp. 1-8. That brief is supported by Vernon's Affidavit. Affidavit of Vernon J Mortensen Opposing Releasing Mortensen Bond Money From This Court. Thus, there may be a dispute of fact that is more appropriately resolved by the court

handling the divorce.

That being the finding of this Court, Marti then alternatively argues I.C. § 8-701 is applicable. That statute reads:

When it is admitted by the pleading, or shown upon examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in the court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

The bond amount at issue here is already deposited with the Court. The bond amount may well be a part of the subject of litigation in the Boundary County divorce proceeding between Marti and Vernon Mortensen. What is clear is the bond amount, at the present time, is no longer "due to another party", in this case the Akers.

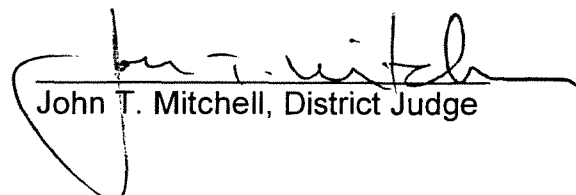
III. ORDER.

IT IS HEREBY ORDERED defendant Marti Mortensen's Motion to Order Transfer or Release of Bond is GRANTED.

IT IS FURTHER ORDERED that defendant Marti Mortensen's request to have those funds directly returned to her, is DENIED.

IT IS FURTHER ORDERED that defendant Marti Mortensen's request to have those funds interplead into the Boundary County divorce action between her and defendant Vernon J. Mortensen, is GRANTED. This Court orders the cash appeal bond posted in the present case, Kootenai County Case No. CV 2002 222, be interplead into Boundary County Case No. CV 2006 224.

Entered this 8th day of January, 2010.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 8 day of January, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer

Susan P. Weeks
Dustin Deissner
Robert E. Covington

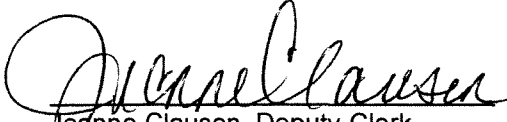
Fax #

208 664-1684 ✓
509 326-6978 ✓
208 762-4546 ✓

Party Pro Se

Vernon J. Mortensen
P. O. Box 330
Naples, ID 83847 *MJd*

*Co. Auditor ✓
Faxed*


Jeanne Clausen, Deputy Clerk

ROBERT E. COVINGTON
Attorney at Law
8884 North Government Way, Suite A
Hayden, ID 83835
Tel. 208-762-4545
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ISB#2312

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 1-21-10
AT 2:50 O'CLOCK P.M.
CLERK, DISTRICT COURT
DEPUTY

Attorney for D.L. White Construction, Inc., David L. White and Michelle V. White

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.)
AKERS, husband and wife,)

Plaintiffs,)

vs.)

D.L. WHITE CONSTRUCTION, INC.,)
DAVID L. WHITE and MICHELLE V.)
WHITE, husband and wife; and)
VERNON J. MORTENSEN and MARTI E.)
MORTENSEN, husband and wife,)

Defendants.)

CASE NO. CV-02-222

ORDER
EXTENDING BRIEFING
SCHEDULE

The parties having filed their stipulation with respect to the briefing schedule now pending, and good cause appearing therefore,

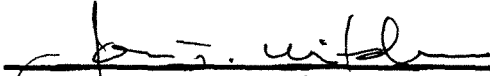
IT IS ORDERED that the briefing schedule for the parties with respect to the easement location issue be extended by one week such that the initial briefs of the defendants will be due on January 22, 2010, the initial brief of

STIPULATION TO EXTEND BRIEFING SCHEDULE

1

Akers be due on January 29, 2010 and the final briefs of the defendants will be due on February 5, 2010.

DATED this 21st day of January, 2010.



Hon. John Mitchell, District Judge

STIPULATON TO EXTEND BRIEFING SCHEDULE

2

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing was ☒ faxed; ☒ mailed by me, First Class mail, postage prepaid this 21 day of Jan, 2000, to:

Robert Covington
Fax: 762-4546 ✓

Susan Weeks
Fax: 664-1684 ✓

Dustin Deissner
Fax: 509-326-6978 ✓

Vernon J. Mortensen
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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
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CLERK DISTRICT COURT

DEPUTY

Pro se

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DENNIS LYLE AKERS and SHERRIE L.	)	Case No. CV-2002-222
AKERS, husband and wife.	)	BRIEF OF VERNON
	)	J MORTENSEN
Plaintiffs	)	SUPPORTING LOCATION
Vs.	)	OF EASEMENT
WHITE CONSTRUCTION, INC.,)	
DAVID L WHITE and MICHELLE V.)	
WHITE, husband and wife; and VERNON J.)	
MORTENSEN and MARTI E)	
MORTENSEN, husband and wife,)	
Defendants)	

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A BRIEF OVERVIEW OF THE CASE AND AN ARGUMENT AS TO THE LOCATION OF THE WESTERN LEG OF THE ACCESS ROAD LOCATED IN SECTION 24

1. Plaintiffs, Akers filed suit against Defendants, Mortensen and White claiming Defendants did not have an easement across a portion of Plaintiffs' land located in Section 24.
2. All parties agreed that the western leg of the access road was located in Akers land in section 24 at the time suit was filed.
3. Akers however argued the road was there due to their permission and that permission was now withdrawn.
4. At the time the suit was filed the access road came off Milsap Loop Road in a southerly direction, turned west, continued due west, crossed into section 24, continued west and then looped southerly into Defendants property.
5. The focus of this brief deals solely with the portion of the road located in section 24.
6. As already mentioned Akers claimed the western leg of the road in section 24 was there by their permission.
7. Plaintiffs, Akers, claimed the original rout of the road turned south at the eastern line of section 24 into Bill Reynolds' property and continued onward to Defendants' property.
8. However, Bill Reynolds who was Akers witness claimed the access road never entered his property. In addition there was no evidence of a road ever taking the route Akers claimed.
9. Richard Peplinski, whose father had owned Defendants property for well over a decade before Akers purchased his property,

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testified that during the duration of his father's ownership the road had always been in the same location as it was presently.

10. Prior to Peplinski's ownership of Defendants' property, Bill Milsap's father owned Defendants' property as well as Akers property. Bill Millsap testified the road was in the same location now as it was decades ago when his father and he used the road.
11. The District Court however ruled that the western end of the access road crossing Akers property in Section 24 did so with Akers' permission and that permission had been withdrawn.
12. As a result of two appeals to the Idaho Supreme Court, it was determined that the final western section of the access road had been located within Akers property in section 24 long before Akers purchased his property and thus Akers did not give anyone permission for the road to be there.
13. The task at hand is to determine the route of that road.
14. Referring to a 1974 aerial photo and the testimony of Richard Peplinski, the Supreme Court described the western end of the access road as being similar to the crook of a Sheppard's staff. In other words curving gently opposed to turning sharply.
15. In an effort to simplify the task of determining an exact route of the access road, I am incorporating into this brief and agreeing to the arguments and findings of Defendants White who are using the services of professionals in establishing a metes and bounds description of the access route.
16. However, I will add that since the present access road has been in use for decades before Akers purchased his property and no one needed permission as to where the road would be, those

who chose the route would have chosen an easy and practical route with a gentle curve like "the crook of a shepherd's staff".

17. Bill Milsap and Richard Peplinski both testified they hauled or dragged equipment up the access road; that would require a gentle curve.

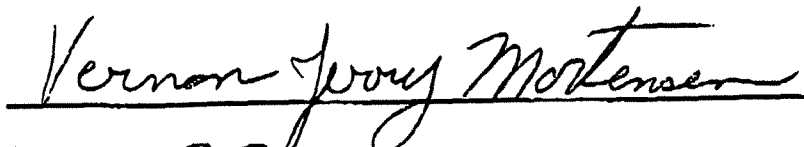
18. In conclusion, Bill Milsap's and Richard Peplinski's use of the road comprised a collective time of decades before Akers arrived and obviously did not need Akers' permission to choose a route. Thus they would select a route facilitating easy access. It is reasonable to conclude that the final western leg of the easement road was similar to the crook of a shepherd's staff as described by the Supreme Court of Idaho.



Vernon J Mortensen

VERIFICATION

Signed: Vernon Jerry Mortensen Pro Se



January 22, 2010.

Subscribed and Sworn before me this 22nd day of January, 2010,

Shaune Delaney

Notary Public for the state of Idaho.

My commission expires 10/7/2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of January, 2010, a true and correct copy of the foregoing Defendant, Vernon J Mortensens Brief arguing the location of the eastern leg of the access road was served by first class mail to:

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Dated January 22, 2010

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STATE OF IDAHO
COUNTY OF KOOTENAI } ss
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CLERK DISTRICT COURT

Linda Shedd
DEPUTY

Attorney for D.L. White Construction, Inc.,
David L. White and Michelle V. White

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.)
AKERS, husband and wife,)
)
Plaintiffs,)
)
vs.)
)
D.L. WHITE CONSTRUCTION, INC.,)
DAVID L. WHITE and MICHELLE V. WHITE,)
Husband and wife; VERNON J. MORTENSEN)
And MARTI E. MORTENSEN, husband and)
Wife,)
)
Defendants.)

Case No. CV-02-222

BRIEF OF
DEFENDANTS WHITE
RE:SECTION 24
EASEMENT LOCATION

BRIEF OF WHITES RE: LOCATION OF EASEMENT IN SECTION 24

I. INTRODUCTION

Come now D.L. White Construction, Inc., David L. White and Michelle White,
hereinafter "Whites", to submit the following brief to assist the trial court in determining
the location of the Whites' prescriptive easement over Section 24 that provides access to
their parcel in Section 24.

In its opinion filed on January 22, 2009, the Idaho Supreme Court determined that the prior conclusion of the trial court regarding the location of the prescriptive easement in Section 24 was not supported by substantial evidence and directed that the issue be remanded to the district court for additional fact finding consistent with the opinion of the Supreme Court. The Supreme Court observed in its opinion that Defendants' trial exhibits 41, 42, 44, and Plaintiffs' Exhibit 253 show that the access road over which Whites' have a prescriptive easement made a gradual turn through Akers' property around a large hill before entering Whites' property in Section 24.

The evidence in the record consists of trial testimony supported by documentary evidence in the form of maps and photographs. Counsel for Whites was not present during the trial of this matter. In preparation of this brief counsel has reviewed all of the trial transcript and documentary evidence to identify that which is relevant to the issue now before the Court. All of the testimony and documentary evidence bearing upon the evidence on this subject was presented to the Court during trial proceedings between September and December 2002, more than seven years ago. As a conclusion to this brief a proposed legal description and map identifying the easement location are submitted as requested by the Court.

II. PHOTOGRAPHIC AND DOCUMENTARY EVIDENCE

The relevant time period for the analysis of the prescriptive easement is between the sale by Millsap to Baker in 1966 of the servient estate in Section 24 and its purchase by Akers from Wiggin and Wilhelm in 1980. There is no evidence in the record that the

location of the road in Section 24 over the servient estate changed during the relevant period of time.

The Supreme Court focused on Plaintiff's Exhibit 253, which is a photograph of the shared boundary between Government Lot 2, Parcel B (the servient estate), Parcel A (the dominant estate) and the Quonset Hut on Parcel A. The photograph depicts a large hill to the south of the access road, which the access road gradually curves around. The Supreme Court found it not plausible that the road turned sharply at the 19/24 section corner 90 degrees to travel up the steep hill depicted in Plaintiff's Exhibit 253.

The Supreme Court found that Defendant's Exhibit D-41, an aerial photograph from 1978 shows that the access road made a gradual turn through Parcel B before entering Parcel A. This photograph depicts the access road traveling west beyond the northwest corner of the Quonset Hut. Defendant's Exhibit D-44, an aerial photograph from 1972 depicts the access road and the Quonset Hut that was constructed in 1971. Like Defendant's Exhibit D-41, this photograph shows the access road traveling into Section 24 to a point as far west as the Quonset Hut. Defendant's Exhibit D-42 is an enlarged portion of Defendant's Exhibit D-44 confirming that the access road traveled west as far as the Quonset Hut.

Defendant's Exhibit J-1 depicts the access road in Section 24 in 1951. Of special significance in the exhibit is the relationship of the west end of the access road to the "big tree" testified to by William A. Millsap, the turn of the road into Parcel B and the distance of the west end of the road from the line dividing the Reynolds property from Parcel B.

Defendant's Exhibit K-1 depicts the access road in Section 24 in 1965. Identically to J-1 is shows the relationship of the west end of the road to the "big tree" testified to by

William A. Millsap, the turn of the road into Parcel A and the distance of the west end of the road from the line dividing the Reynolds property from Parcel A.

Defendant's Exhibit L depicts the access road in Section 24 in 1970. It identically depicts the relationship of the west end of the road to the "big tree" testified to by William A. Millsap, the turn of the road into Parcel A and the distance of the west end of the road from the line dividing the Reynolds property from Parcel A.

Defendant's Exhibit D-43 is a USGS quad map depicting the access road in Section 24 in 1973. It shows the relationship of the west end of the road to the Quonset Hut that was constructed in 1971 or 1972. The map shows the access road traveling west as far as the Quonset Hut before turning into Parcel A.

Defendant's Exhibit D-57 depicts the access road in Section 24 in 1994 showing particularly the "big tree" which was referenced as a "monument tree" in the testimony of Jerry Mortensen and the relationship between the "big tree", the boundary line and the gate after it had been moved by Peplinski in approximately 1984.

Plaintiff's Exhibit 158 depicts that access road in Section 24 and the "big tree" in 1994 at the time of the Peplinski/Akers litigation. This photograph shows the access road after Peplinski moved fill material to the bog in the early 1980's from the steep hill on the south side of the access road in Section 24, thereby permitting him to turn the access road onto Parcel A nearer the 19/24 corner than had been the case until that time.

Plaintiffs' Exhibit 176 shows the relationship between the 19/24 section corner, the boundary line between White and Akers and the big tree along the property line west of the section corner.

Plaintiffs' Exhibits 183 and 191 depict the width of the access road at the top of the hill near the time of Akers' purchase and before modification by Peplinski in approximately 1984.

Plaintiff's Exhibit 184 depicts the previously referenced gate at the top of the hill on Parcel A and the west end of the access road.

Plaintiff's Exhibits 49,50,51,56,57,64,65,73,79,156,176 and 256 as well as other exhibits depict the access road in Section 24 showing the relationship between the access road, the boundary line and the "big tree" at various times.

Defendant's Exhibit E, a 1998 Kootenai County Aerial Photograph depicts the access road in Section 24 in 1998 including the "big tree" and a clear view of the extent to which the access road location in Section 24 was modified by Peplinski in the mid-1980's.

III. TESTIMONIAL EVIDENCE

The witnesses who testified about the access road in Section 24 were Alan Kiebert, Richard Peplinski, W.L. Millsap, Sherrie Akers, Dennis Akers, William Reynolds, David White and Jerry Mortensen. The relevant testimony provided by each of these witnesses is presented below:

Alan Kiebert testified about photographic exhibits that were admitted into evidence including Defendant's Exhibits E, G, H, H-1,I, I-1,J,J-1,K,K-1,L and W, all of which are aerial photographs depicting the access road and other features in Section 24 at various dates. Mr. Kiebert testified specifically about the access road in Section 24:

In reference to Defendant's Exhibit I-1 Mr. Kiebert testified as follows:

Q. Okay. Let me just rephrase it. Do you know—you testified that it went up the section line to the field.

A. That's correct.

Q. What did you mean by the field?

A. That would be Mr. White's property.

Q. Mr. White's property?

A. Yes.

Q. And does it cross the section line between 24 and—

Mr. James: Objection. Beyond the scope. I asked him about the approach area, and now she's extending it beyond that area.

The Court: I'm going to overrule the objection.

Q. Does it cross the government section or the section line?

A. Yes, it does.

Q. And is that clear on Exhibit I-1?

A. Yes, it is.

(Tr., Vol. II, p. 1823, ll. 5-23).

In reference to Defendant's Exhibits I-1 and K-1 Mr. Kiebert testified as follows:

Q. I'd ask you if you'd please look at Exhibit I-1 and K-1 together, and would you agree that Exhibit I-1 was taken in 1951 and K-1 in 1965?

A. Yes, I do.

Q. Have the characteristics of the areas you have circled in your big blue circle on each, have the characteristics altered?

A. Uh, very---very little actually. The only alteration is the road going up along the section line into Mr. White's property looks like it's been used more.

Q. Okay. When you say used more, do you mean just you can see it better?

A. You can see it better, yeah. You can see it on I-1 very plainly, but it is even more plain on K-1.

(Tr. Vol. II, p. 1825, ll. 3-18).

In reference to Defendant's Exhibits W and K-1 Mr. Kiebert testified as follows:

Q. Now, you were asked about this road and how could you tell where the property line is. Can you look at Exhibit W or Exhibit K-1 and ascertain how far over the section line the access road goes, and when I say section line, I mean the section line into 24?

A. I's gonna estimate it about three---about 150 feet.

(Tr. Vol. II, p. 1830, ll. 20-25).

W.L. Millsap testified about the status of the access road into Section 24 during the period from 1948 to 1966 based upon his memory and with reference to photographic exhibits.

Under cross-examination by Mr. James, Millsap testified as follows:

Q. Let's talk about further up the hill. Farther up on the hill the road went out at almost a straight 90-degree turn, right, as you got to the top of the hill?

A. No. You mean at top where it went into the 160 acres?

Q. Right.

A. That was a big wide curve from there.

Q. Okay.

A. That was the biggest---yeah, that was a wide, wide gate up there.

Q. And that was a left-handed curve turn, right?

A. As you're going west you'd take a left to get into the 160 acres.

Q. But it was in this configuration. Fair to say?

A. Oh, basically. It was more of a ---not that sharp a curve.

Q. Okay. You see this? You've already testified D-44 shows the road kind of as it was. Do you see that curve? That's a pretty sharp left-hand curve, isn't it?

A. Yeah. But what year was this picture taken?

Q. It's Defendants' Exhibit ---

A. Because there's been a lot of changes made between this picture and when I was there because this road came up and it was into this field, and it was a wide curve. There was a big pine tree that stood right here over on the edge of the road. It may not be there now. And then the bank started in here, and it went down ---you see this? This is a crop field here.

Q. Right.

(Tr. Vol. I, pp. 900-901).

Q. Okay. At the top of the road -- I want to speak specifically after you get by the Section 19 to 24 line which is this line. This is the section line between Sections 19 over on this side and 24 on this side, and I'm showing you this on Plaintiffs' Exhibit 6. After -- at the top of the road up here which is just past the section line 19 and 24, was the turn into your property all on the 160 acres?

A. Uh, no. The turn, it come up -- the road is just like it is. It came right on up past into Section 24 and then turned into the 160 acres.

Q. Okay.

A. So you can -- and that's where the gate that I used was.

Q. Okay. So the road did cross over the Section 19/24 line?

A. Yeah.

Q. Okay. And where it made that turn onto the 160 acres that your folks owned did any part of the road come back over across the line into Section 19?

A. No.

Q. It was all on Section 24, wasn't it?

A. Yeah, where you turned in. Then when you got into the field – when you're turning on – come here a minute. Can I show you?

Q. Sure.

A. –on this? Okay. The road came up just like this and then into here, and then maybe it curved back over to this other one here, but this part there was where the big wide fence was, and I remember a big pine tree there, and the brush started in about here, but that was a big wide – wide thing to get that – when you're coming up the hill and you're dragging your – your tractor's running up here and this is dragging behind and your tractor come around, that would drag like this, you know, like it ordinarily would.

(Tr. Vol. I, pp. 914-915).

Jerry Mortensen testified as regarding the location of the "big tree" as follows:

Q. I'm gonna show you Defendants' 57.

A. Um-hmm.

Q. What area of the road does that photograph depict?

A. There again, that --- we're looking up at the gate going into the Peplinski field, but everything we're looking at there is on the Peplinski property. We're about to the point that would be crossing off of the Akers property into the Peplinski property.

What needs to be understood is, uh, is that this road that goes into what they're saying is the Peplinski property, this road is in section, what is it, 24, and it's also on the 160 acres of, uh, the Peplinskis'.

In fact, this big tree right here if your drive up there today, this big tree you see right there, uh, that is a bearing tree, and it's got the surveying bearing tree, you know, giving you directions exactly where to find the survey corner.

(Tr. Vol. I, pp. 951-952).

William Reynolds testified regarding the location of the access road in Section 24.

Q. Did it – do you know how it ended up being extended in this fashion that we see in Exhibit 6, the road west of Government Lot 2 of the Akers' parcel?

A. That was – David White was who expanded it out there.

Q. I'm sorry. You said that David White and his crew expanded it?

A. Yes.

Q. When did they do that approximately? Don't have to be exact.

A. This spring. It was during the winter there he had, uh, Shaun Montee come up, and he had an excavator up there and dug out a bunch of it and started it and then he – he finished it with his dozer.

Q. Again, that's the road west of Government Lot 2, this being Government Lot 2?

A. Yes.

Q. So originally in 1966 this road here didn't even exist. Is that fair to say?

A. No.

Q. Was that correct?

A. Yeah. It never existed, no.

Q. Up until Mr. White extended it?

A. Yes, he extended – I don't know where it went to. I've never been on it, but he went on it accrossed his property west.

Q. Fair enough. I think I made my point. I just want to, I guess because my question was poorly drafted, poorly stated, I wanted to clarify it. I'm correct, aren't I, when I say that Mr. White extended the road in the fashion that we see it in Exhibit 6 on the western side of Government Lot 2.

(Tr. Vol. I, pp. 85-86).

Q. Do they depict any damage caused by defendants' activities?

A. It's hard for me to tell exactly where your property line and whatever is there but seeing's how –

Q. With regard to property lines –

A. Well, it shows the damage that's done or the work that was done.

Q. Fair enough.

A. I haven't been up there and looked at it personally so it's a little hard for me to tell you exactly what was done up there.

(Tr. Vol. I, pp. 115-116).

Under cross-examination by Mr. Reagan, Mr. Reynolds testified as follows:

Q. Okay. Let's talk about this road depicted here in the 1973 USGS map. What do you think this little square is over here in Section 24?

A. I would guess it's probably a little steel building that sets up there.

Q. Is that maybe a little Quonset hut that Peplinskis put up there?

A. Yeah.

Q. They put that on their own property, didn't they?

A. Oh, I think so, yeah.

Q. When we're coming across this road that depicted in this Defendants' Exhibit 43, that's crossing the section line into Section 24, isn't it?

A. Yeah, right.

Q. Is that how you recall the road being in 1966?

A. Yeah. Certainly. The property line is right here alongside it.

Q. Okay.

A. Right there.

Q. But I'm talking about before – what I call the Section 24 corner, that in Section 24, isn't it, before it dips south?

A. Yeah.

Q. Did it ever go onto your property –

A. No.

(Tr. Vol. I, pp. 140-141).

Richard Peplinski testified regarding the location of the access road in Section 24 as follows:

Q. Okay. Do you have any recollection of about how much you raised the road in the lower portion?

A. As I recall, we put in – it was either 18 or 24 inch culverts, two of them down in the bottom, and by the time we put the fill over the top we probably raised it three feet at the very most.

Q. And where'd you get the material to raise the road in the bottom?

A. Pushed it off the steep embankment that was on our property at the very top.

Q. Okay. Let's talk about the top. Let's – first in D-44, I'm gonna point to this little square right here. Do you have any idea what that is?

A. That's the Quonset hut that I had built.

Q. Okay. Do you remember when you built that?

A. In about 1971.

Q. Okay. Was that Quonset hut located on your property?

A. Yes.

Q. About how far – do you know where the 19 – section line between 19 and 24 ran?

A. It would have been our eastern fence line.

Q. Okay. So you know where that section line was as it was on your property?

A. Correct.

Q. About how far west of that section line was the Quonset hut that you built?

A. Probably about 75 feet from the very corner to the section line.

Q. Okay. So we have the section line and then we have about 75 feet and then we have your Quonset hut?

A. Correct.

Q. And how wide was the Quonset hut?

A. That's, uh, 30 by 40 I believe, so it's 30 feet wide, 40 feet long.

Q. Okay. And in an east/west how wide was it?

A. Well, it didn't sit a true east/west. It sat at an angle so you're almost --- so you have to measure from corner to corner if you want to go east to west, so whatever the diagonal measurement of that would be across a 30 by 40 building. I couldn't tell you.

Q. Okay. How about the access road here at the top, how did that – did that come to the Quonset hut?

A. At what time? It goes by it now because it went—that's the reason we put the Quonset hut there. The road was there after we turned into our property.

Q. Okay. So the road was there, and did you place – I guess when you constructed the Quonset hut did you place it at the – let's call it the end of the road. That's just where the road went onto your property?

A. Yes.

Q. And as far as you know is a portion of that road at the top, it that on the property now owned by Akers?

A. Yes.

Q. And about – do you know where the section line –well, let me ask you this. Did your fence line stop at your property corner?

A. Yes.

Q. Okay. And this would be the corner of the Section 19 and 24 and also the quarter corner into 24?

A. Okay. Yes.

Q. Okay. So this would've been the corner of your property?

A. Okay. Yes.

Q. That would be the northeast corner. Did your fence run right up to the corner?

A. Yes.

Q. About how far did the road extend westerly past this – your northeast corner, the section line between 19/24?

Mr. James: Objection with respect to time frame.

Q. At the time you purchased the property?

A. I would have to estimate 125 to 150 feet.

Q. Was that the road traveling in an east/west direction beyond that section line?

A. Correct.

Q. And why is that?

A. Because that's the only place we could turn into our property where there was not a steep embankment because that reached the top of that part of the knoll.

Q. So there was a steep embankment of your property right over there in your northeast corner area?

A. Correct.

Q. And that would've been higher than the road as it existed then when you purchased the property?

A. Correct.

Q. So did the road in essence go around the high embankment?

A. Yes.

(Vol. I, pp. 779-782).

Q. Well, here, let me ask some of these. I'm going to show you Defendants' 57. Do you recognize that area?

A. Yes.

Q. And what does that photo depict?

A. That's the upper portion of the roadway before it turns into our property.

Q. Okay. Is that the gate you're referring to earlier?

A. Yes.

Q. Here in the foreground?

A. Yes.

Q. And does that accurately depict the, I guess, consistency of the road?

A. Yes.

Q. And do you know in relation to --- do you have any idea in relation to the corner here where that photo is taken from?

A. Appears that I was probably standing real close to the section corner there.

Q. And is that --- is most of the stretch of the road shown in that photograph the area that would be to the west as it turns into your property?

A. Correct.

Q. And do you recall about when that photograph was taken?

A. Without looking at the date, no.

Q. Regardless of the date of that photograph, how would the road compare to the time--- to the condition of the road at the time your dad purchased the property?

A. This has been improved from the time we -- when he purchased it.

(Vol. I, pp. 788-789).

Q. Okay. At any time since your dad's purchase of the property did you ever reach any agreement with Mr. Akers to change the Section 24 corner?

A. To change the Section 24 corner?

Q. Right.

A. Uh, I don't understand your question.

Q. Okay. To change the road from what it was in the Section 24 corner area, to change it from what it was like when you purchased the property?

A. That was part of the agreement of how much we could put down in the bottom for fill, and that's where I got the fill from was off our property so I don't know if -- that all happened at the same time.

Q. Okay. What did you do when you filled in the lower section of the property? What did you do up above in the Section 24 corner area?

A. Took the embankment that was on our property on the south side of the property fence line and used that for the fill material down n over the culverts at the bottom and on the approach area there.

Q. Okay. So in performing that work did you change the preexisting configuration of the access road up in that area?

A. Yes.

Q. And how did you make -- and what changes?

A. Uh, it had a tendency to curve into our property more, and we changed the corner so it would widen out so we could turn into our Quonset hut more easily.

Q. Okay. And did that have the effect of moving the westerly side of the road more westerly?

A. No. No.

Q. I'm just pointing. Did it expand it out westerly?

A. From what it originally was, no.

Q. It didn't? So then in the agreement what part of the road on the Akers' property up at the top of the hill, the Section 24, what change was there to the road?

A. Uh, minimal. Nothing actually because we curved onto our property.

Q. So it was mostly just taking down the bank on you property and pushing that material down the road?

A. Correct.

(Tr. Vol. I, pp. 798-800).

Under cross-examination by Mr. James, Mr. Peplinski testified regarding the access road in Section 24 as follows:

Q. Yeah. I didn't mean to slip anything in there. I mean, you talked about you did some work at the top of the road there, and there was some changes that were made. I want to talk about the time prior to that to get this in sequence.

When your parents first purchased the property, there was a gate up there or gate that you put in?

A. When my parents first purchased the property the gate was a barb wire/post type gate.

Q. Okay. Fair enough. And it was in that location, (referring to Plaintiffs' Exhibit 183), was it?

A. Correct.

Q. Okay. Fair enough. That's -- frankly, I'm just trying to get an understanding of that. So there's the barb wire gate there, and then you put in this gate here?

A. Correct.

Q. Okay. And that's at the top of the road where you would take the farm machinery through and then into the field, the alfalfa field?

A. Correct.

Q. Was it alfalfa back when they purchased it?

A. Yes.

Q. Right on this side was alfalfa over here?

A. Yes.

Q. Because I also have some photographs that have some grain?

A. Obviously every year you have different crops.

Q. Okay. And if I understand right, that was the only access for your farm machinery into the 160 acres?

A. Correct.

(Discussion re: evidentiary objection)

Q. Now, in sequence, to keep it in sequence we have a --- well, in sequence, okay, so we have the gate through which the farm machinery passed at the top, and that's prior to the changes, and then you made the changes to the road, and if I understand it right, tell me if I am wrong, basically the changes were made, and this is obviously not to scale, but just to give the concept, rather than having more of a right angle to the road to provide a more sweeping curve to the road?

A. Correct.

Q. And Exhibit 17, pardon me -- I have here an exhibit from the prior litigation. I'll have this marked in this litigation, and that would be 184.

And 184, would that then represent the condition of the road after you changed it for the more sweeping curve at the top?

A. Correct.

Q. Okay. In comparing Plaintiffs' Exhibit 64, for example, to this area has there been changes in that Exhibit 64 to areas that appear in Exhibit 184?

A. Well, prior to this obviously one is – either prior or during the improvements to the road and the other one is the final product.

Q. I'll represent to you that this Exhibit 64 was taken more recently after your involvement with the property when the defendants were involved with the property.

A. Okay.

Q. And so I guess my question is we see here 184 after your improvement to that top of the road, and then we see that general area changed here in Exhibit 64?

A. Okay.

Q. Is that fair?

A. Yes.

(Tr. Vol. I, pp. 803-806).

Scott Rasor provided testimony regarding the accuracy of maps such as Defendants' 43, referred to as a quad map, and Defendants' 42, a blow up of a USGS map depicting the area of the access road in Section 24, as follows:

Q. Can you quantify for us the margin of error?

A. Well, on a quad sheet that blown up like that –

Q. Exhibit 43.

A. Yeah. You can scale a full-size drawing within 200 feet.

Q. Within how many feet?

A. Two hundred feet.

Q. Two hundred feet?

A. Yeah.

Q. In other words, so this road that's depicted here could be 200 feet one way or the other?

A. I'm not saying that. I'm just saying if you're trying to pick – go to that drawing and scale a distance at a twenty scale, one—well, I don't know the distance, but you can't accurately scall off those drawings more than 200 feet, but, you know, the roads that are drawn shown on those were taken from aerial photos and then put onto the map, so as good as the photo is so is the drawing, the quad sheet.

(Tr. Vol. I, pp. 464-465).

Regarding the access road as he depicted it on Plaintiffs' Exhibit 7, Scott Rasor testified as

follows:

Q. Okay.

A. But you can see I show the physical road where it's located, okay, so that means there's some kind of –

Q. Okay.

A. --prescriptive or whatever.

Q. Okay.

A. So I think I've addressed it on the drawing by showing that road continuing.

(Tr. Vol. I, p. 551, ll. 4-12).

Sherrie Akers testified regarding the location of the access road in Section 24 in 1980, the time Akers purchased their property as follows:

Q. And the same -- this is the 1978 aerial. This would've been, what, two years before you purchased?

A. Before we purchased, yeah.

Q. Isn't it true that this also shows -- is this the angle you're talking about where it kind of went along a little further and then angled back? It's a little more visible in this.

A. That's not what I am talking about. See where it comes across onto this map? It shows it comes across---

Q. The section line?

A. Right. Crosses and curves kind of back? It didn't do that. It crossed on the section line over and angled to the barn. It didn't cross over and back.

Q. So do you think your recollection is better than the aerials?

A. I rely on my memory.

Q. Regardless where you may recall the road running, the fact is there was a road crossing the section line going up to the barn, Quonset hut?

A. It did not cross it. It turned on our property on the section line and crossed it after it crossed over our property, and Peplinski lengthened it so it went a little further.

Q. When did Peplinski lengthen that?

A. I don't remember.

Q. Do you know what the Peplinskis did with this road prior to your purchase of the property in 1980?

A. No. I only know what I saw in 1980.

(Tr. Vol. I, pp. 421-422).

Q. Okay. Now, first of all, so that we're clear, this --

The Court: What's the exhibit number again?

The Witness: 183

Mr. James: This is Exhibit 183, Plaintiffs' 183 referring to her bending over, and then Exhibit 191 with a close-up of the tape measurement.

Q. Now, so that we're clear, Exhibit 191 shows us the tape measurement of the width of that gate as it appears in Exhibit 183, right, that gate?

A. Um-hmm, yes.

Q. And that was the gate that was up here in the brushy area where the original configuration of the road curved at a sharp angle?

A. Yes.

(Tr. Vol. I, p. 995, ll. 9-23).

Dennis Akers testified regarding the location of the access road in section 24 as follows:

Q. Now let's talk about this upper portion of the road. When you moved in was the road in that configuration?

A. That it shows on the map there?

Q. Right here, yeah.

A. No, no.

Q. Okay. Let's go back to the Peplinskis. Did the Peplinskis, younger Peplinski – strike that. When you first moved in what was the configuration of the road? Was it as your wife described in the 90-degree approximately configuration?

A. Yeah, it was pretty close. It went right to that and turned a pretty sharp 90 right in there, yeah.

Q. South?

A. Yeah.

(Tr. Vol. I, p. 564, ll. 7-12).

Q. Did you put the fences up?

A. The south side is Homer and Bill Reynolds, and they put them all up.

Q. What about the north side?

A. The north side Peplinskis at one time when they put the culverts in they put those fences in, but they've since been changed to I put them all in.

Q. Wait a minute. The Peplinskis put this fence in along the north of the road?

A. They put – what's left after Mortensen tore down on the top, that is the only piece left that they put in. From the Y up on the north side.

(Vol. I, p. 614, ll. 2-13).

Q. When you purchased the property in 1980 -- could you show me on Plaintiffs' Exhibit 6 where the road was, and start with the Millsap Loop Road?

A. You want me to show you where the road was?

Q. Um-hmm.

A. Okay. It came right in, went up Bill Reynold's driveway straight up here, got to the end of Lot 2 and tucked a hard 90 right there when I bought the property.

Q. Okay. Was it on Section 24 up there or was it on Section 19?

A. It might be a few feet that got into 19, but not very many. There was a—there was a railroad tie stake marker right there, and you could – Peplinskis' gate was in touching distance of that corner.

Q. That's Peplinskis' gate at the top of the hill?
A. Right.
Q. Okay. And that was on their property?
A. No. It was on mine.
Q. Where on yours? I thought you said it was adjacent to the corner?
A. Where was it on my property?
Q. I asked you if it was on their property. I thought you – did you say that the railroad tie was right by this section corner?
A. There's a railroad tie stake marker right there.
Q. And their fence was next to that?
A. There wasn't a fence.
Q. Excuse me, their gate. Their gate was next to that?
A. And it was – yeah, and it was on their property.
Q. And now it is on their property?
A. Right.
Q. At the top of the hill?
A. It was – the top of the hill – the gate was actually down. It wasn't totally on the top at that time.

(Tr. Vol. I, pp. 620-621).

IV. DISCUSSION OF THE EVIDENCE

The Supreme Court remanded to the District Court the issue of the location of the access road in Section 24 for additional fact finding consistent with its opinion. The Supreme Court found that the access road historically made a gradual turn through Section 24 around a large hill to the south of the access road before turning to enter property owned now by Defendant David White. The Supreme Court relied upon Defendants' Exhibit 41, 42, 44 and Plaintiffs' Exhibit 253 in reaching its conclusion. The question thus posed is where on ground do those exhibits place the access road prior to the Akers purchase in 1980.

Richard Peplinski, William Reynolds and William A. Millsap all testified that Exhibits 42, 43 and 44 depict the access road location in Section 24 as it existed prior to 1980. Plaintiffs' Exhibit 253 provides a view of general setting of the terrain in Section 24

where the access road has existed since prior to 1951 as confirmed by Defendants' Exhibit I. Plaintiffs' Exhibit 156 provides a similar but nearer view of the general setting of the terrain in Section 24 where the access road existed after modification by Peplinski in approximately 1984. Defendants' Exhibit E provides an aerial view from 1998 showing the setting in Section 24 and significant reference points including the Reynolds/Mortensen property line, the Quonset hut, the 19/24 corner and the "big tree".

Significant reference points on the ground in Section 24 that have been in place throughout the relevant time period are established by the evidence in the record. Plaintiffs' Exhibit 176 shows the property line between the Akers parcel on the north and the Peplinski/Mortensen/White parcel to the south. Also visible in Exhibit 176 adjacent to the westerly portion of the visible property line is the big tree/monument tree testified to by Mortensen and Millsap and the 19/24 section corner. Defendants' Exhibits 41, 42, 43 and 44 all depict the position of the Quonset hut relative to the section line between 19 and 24 on the east, the access road on the north, the big tree to the northwest and the 19/24 section corner to the northeast of the Quonset hut. Each of these exhibits depicts the access road running west in 1972 and 1978 as far as the Quonset Hut. Richard Peplinski testified that the Quonset Hut was set approximately 75 feet west of his eastern property line which he shared with Reynolds. Plaintiffs' Exhibit 253 provides a clear view of the topography of the site, the 19/24 section corner, the big tree, the ravine to the west of the big tree and west end of the access road and the area at the top of the hill from which Peplinski removed fill material in 1984 that allowed him to turn the access road onto his property east of the previous turning point nearer the big tree. The 1998 aerial photograph of the site with overlay that was originally marked as Defendants' Exhibit E depicts the site showing

clearly the big tree where the access road originally turned into the 160 acre parcel, the Quonset hut, 19/24 section line and corner. Similarly, Defendants' Exhibits I-1 and K-1, being aerial photographs of the site from 1951 and 1965 respectively depict the course of the access road relative to the 19/24 section line and corner, the brushy triangle and the big tree. The detail and consistency of the visible evidence in the record demonstrate the location of the access road prior to 1980 during the prescriptive period relative to the reference points on the ground.

The testimony in the record that describes the location of the access road prior to the Akers' purchase in 1980 has been presented above. Alan Kiebert testified that the road traveled approximately 125-150 feet into Section 24 along the property line based upon his estimate from his examination of the aerial photographs including exhibits D-41, 42 and 44 the quad map exhibit D-43, and exhibits I-1 and K-1. Scott Rasor's testimony that one could scale up to 200 foot dimensions from the quad maps in evidence corroborates that Kiebert could make a reasonable estimate based upon the evidence in the record since the distance is less than 200 feet. Richard Peplinski estimated that the access road traveled 125-150 feet into Section 24 along the property line before turning south into his property in the period prior to 1980. Millsap testified twice that the access road traveled into Section 24 along the property line to a point near "a big pine tree" which he pointed out on an exhibit before turning south into his property. The big tree is located along the edge of the access road and the point where the hill begins to drop back down into a ravine west of the point where it curved south. Jerry Mortensen identified the same tree calling it the "monument tree" reflecting the survey markings on the tree.

In the process of producing a metes and bounds description of the boundaries of the prescriptive easement in Section 24 a map has been generated by Welch Comer and is attached to this brief. The monument tree is identified on the map as being located 149.2 feet west of the 19/24 corner and 2 feet north of the property line between Akers and White. Examination of photographic evidence in the record that has been identified above including D-57 and Plaintiffs' 176 reveals the big tree near the property line and west end of the access road prior to the modification by Peplinski around 1984. Collectively, the evidence demonstrates clearly that prior to modification by Peplinski, the access road extended west along the property line to the vicinity of the big tree, a distance of 125-140 feet from the 19/24 section corner before turning south into White's property.

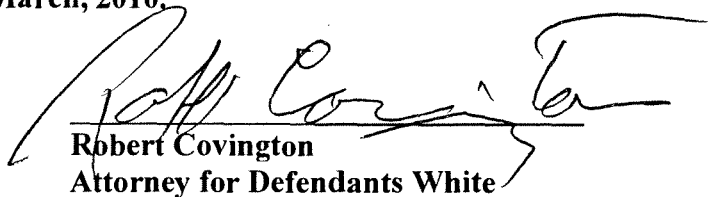
Photographic evidence and testimony in the record provide a basis for determining the wide of the prescriptive easement in Section 24. The best evidence is Plaintiffs' Exhibit 183 showing Sherrie Akers measuring the gate at the top of the hill near the time of Akers' purchase of their property. Plaintiffs' Exhibit 191 displays the measured width of the gate at the top of the hill as 20 feet. From Plaintiffs' Exhibit 183 one can discern that the travel way is as wide as the gate across the access road in Section 24. Notably, the large shadow across the access road in Plaintiffs' Exhibit 183 is almost surely the big pine tree referenced above. Other evidence in the record regarding the size of equipment that was pulled up the access road confirms its width being approximately 20 feet.

As a component of its work in generating a metes and bounds description of the prescriptive easement, Welch Comer ascertained the dimensions of the roadway in Section 24 that is depicted on Defendants' Exhibits 42 and 43. The width of the depicted roadway on Akers' property in Section 24 in those exhibits is approximately 30 feet. It should be

understood that the northern line of that roadway as depicted in the referenced exhibits is along the toe of the roadway, meaning the junction between the natural slope of the hillside and the earth that was pushed down the hill during construction of the roadway, not along the edge of the travel way.

The evidence in the record demonstrates that the during the relevant period for the prescriptive easement the access road traveled east/west along the property line into Section 24 a distance of approximately 125 to 140 feet from the 19/24 corner and that the travel way was approximately 20 feet wide before it turned south near the big tree into the Peplinski property. As directed by the Court, a proposed description prepared by Welch Comer of the prescriptive easement for the access road in Section 24 is attached to this brief along with and a map depicting the location of the described prescriptive easement.

Respectfully submitted this 25th day of March, 2010.


Robert Covington
Attorney for Defendants White

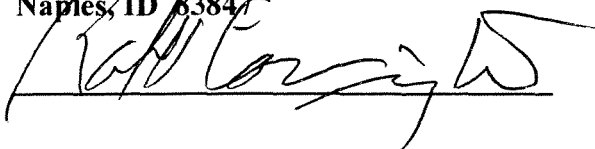
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Defendants White was served on March 29, 2010 by mail to:

Dustin Deissner
Van Camp & Diessner
1707 W. Broadway Avenue
Spokane, WA 99201
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1626 Lincoln Way
Coeur d'Alene, ID 83814
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Vernon J. Mortensen
PO Box 330
Naples, ID 83847



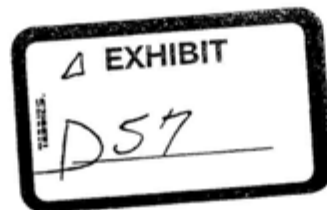


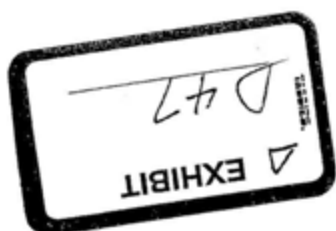
ADMITTED IN EVIDENCE

Date 10-17-02
Deputy Clerk

0194

PLAINTIFF'S
EXHIBIT NO. 184
IDENTIFICATION/EVIDENCE
CASE NO. 1002222
DATE: _____





9-10-03 MT



1-26-02

Excursion

PLAINTIFF'S
EXHIBIT NO. 176
IDENTIFICATION EVIDENCE
CASE NO. 11002232
DATE: 9-10-08

9-10-02 MT





9-9-03 ST



WHITE

AKER

BELMONT

AREA MAP BASED ON 1993
KOOTENAI CO. AERIAL PHOTO
W/OVERLAY OF ROAD ROWS

KEIGH

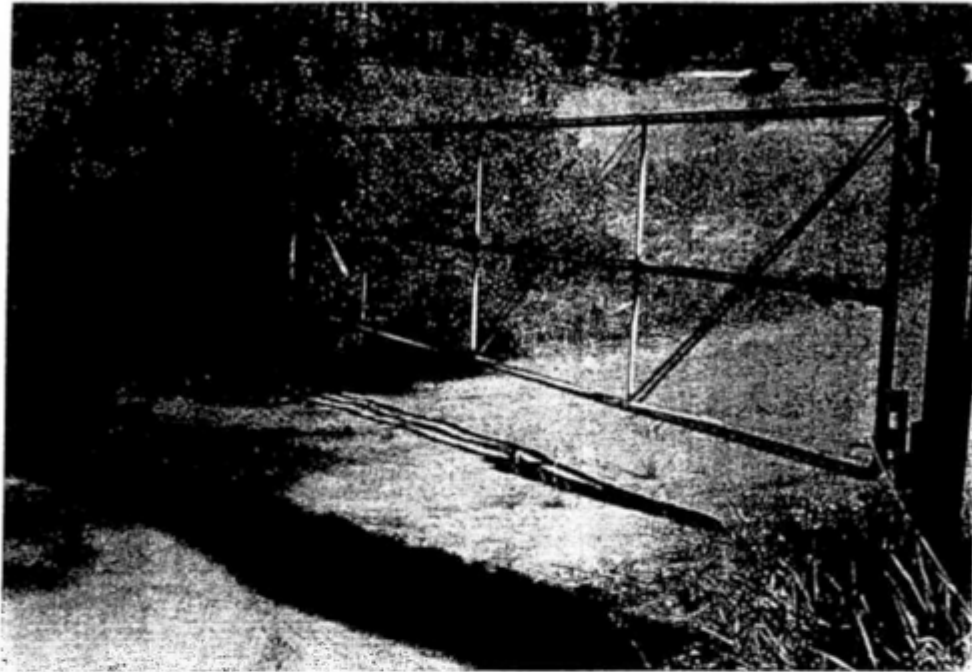
MILLSAP LOOP ROAD

OLD SCHOOL HOUSE
(BY TESTIMONY OF B. PINODES)

LEGEND

- PIONEER ROAD #98
- MILLSAP ROAD #92
- KOOTENAI CO. 1993 AERIAL PHOTO
- AERIAL PHOTO 1993
- AERIAL PHOTO 1993

tabbles
EXHIBIT
3
3
B
V08-222



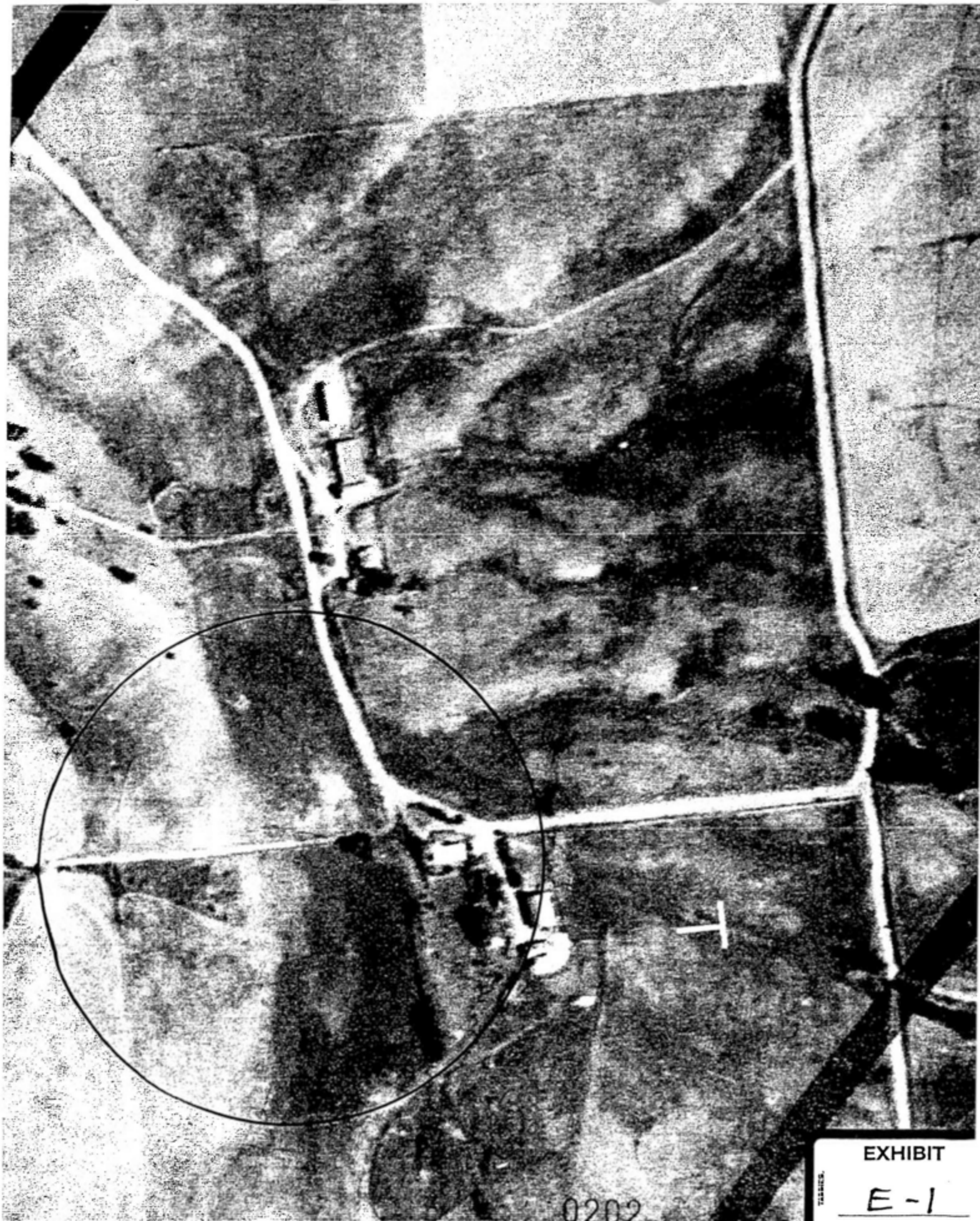
*Original width of road.
Gate set in by Dep.*

PLAINTIFF'S
EXHIBIT NO. 183
IDENTIFICATION/EVIDENCE
CASE NO. 10-17-00
DATE: _____

10-17-00

8/8/65

DOS-2FF-93



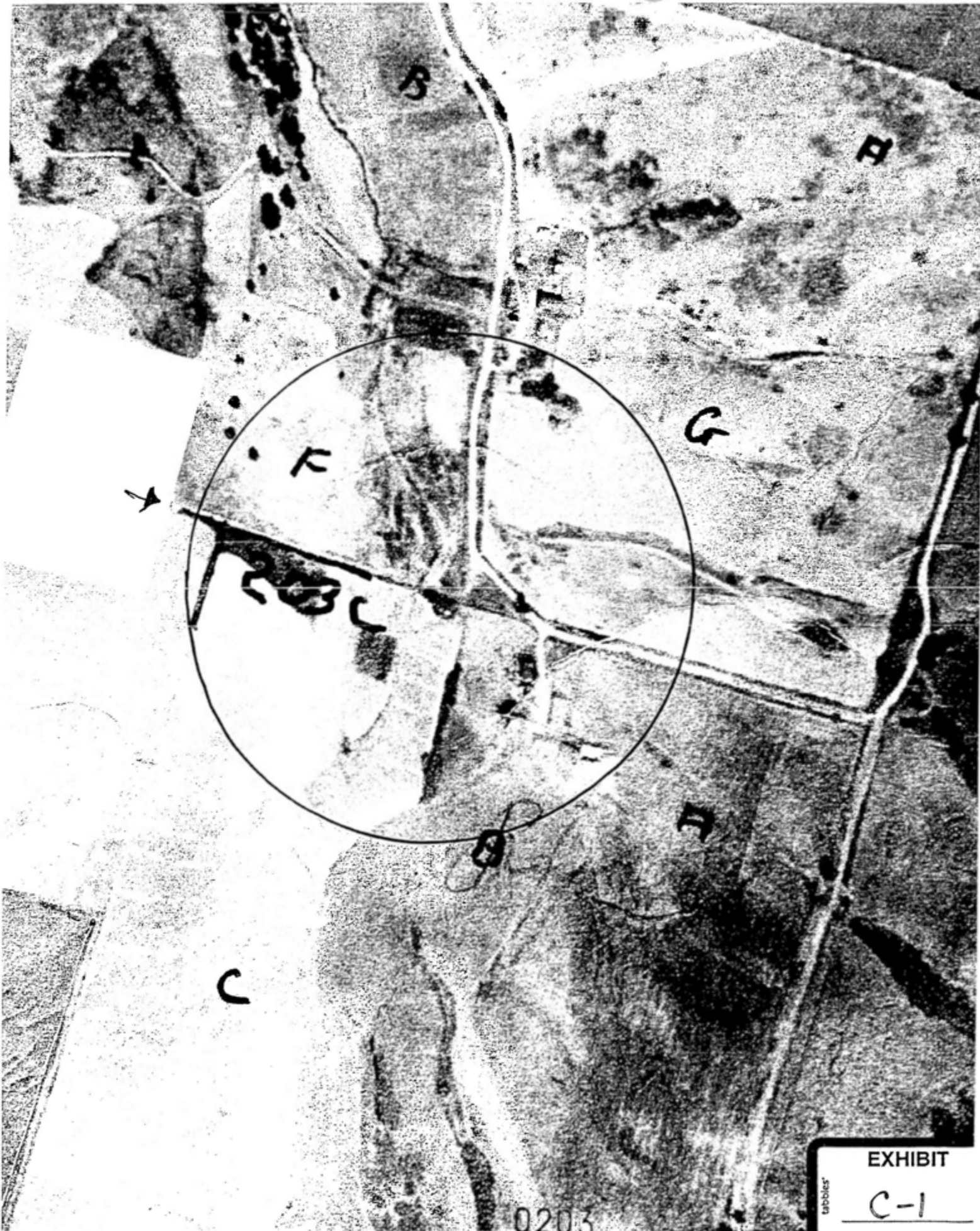
EXHIBIT

E-1

0202

7/30/51

DOS-14-43



EXHIBIT

C-1

0203

EXHIBIT "B"

SEC 24, T50N, R6W KOOTENAI COUNTY, IDAHO

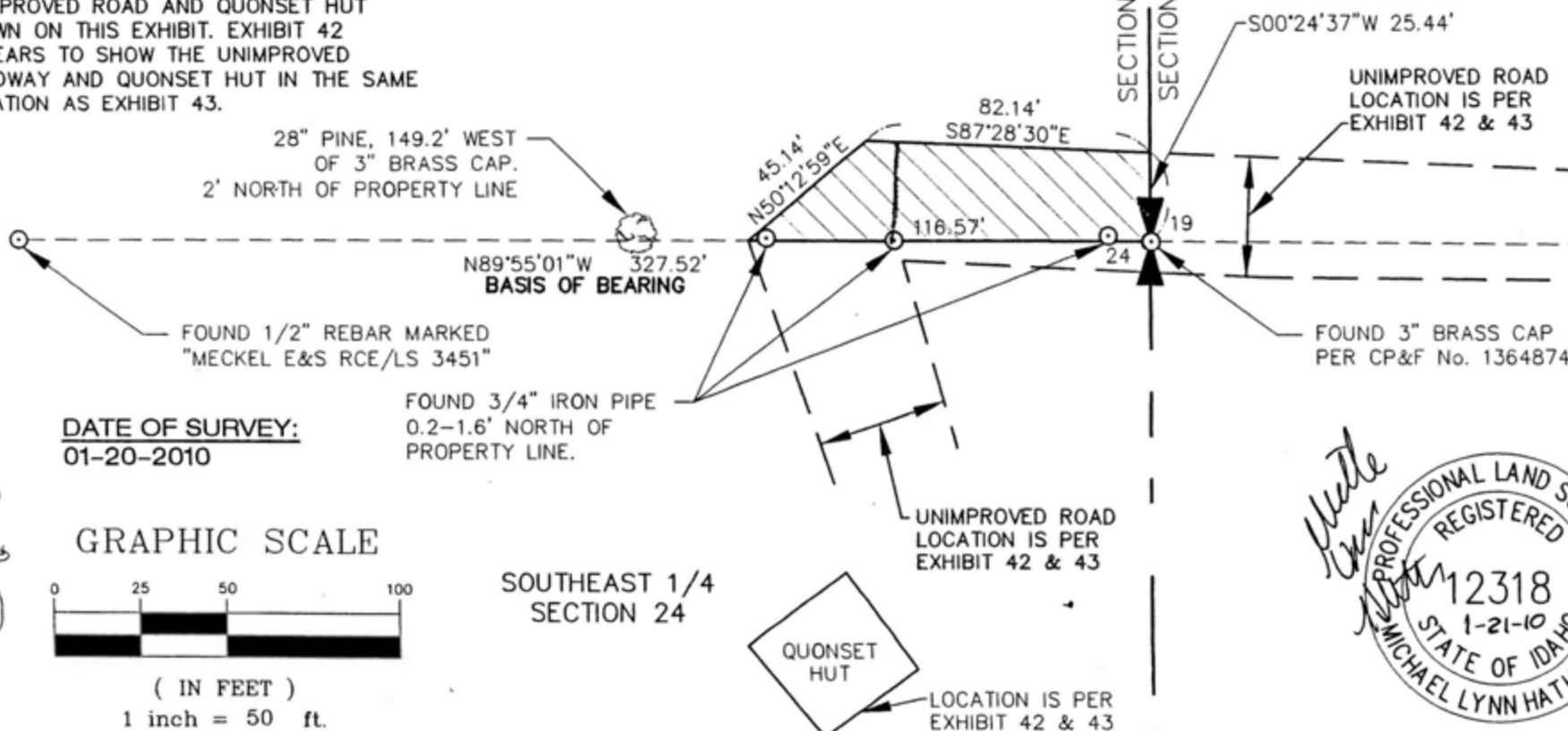
NOTE:

THIS EXHIBIT IS INTENDED TO REPRESENT THE SPATIAL RELATIONSHIP BETWEEN THE SECTION LINE, QUONSET HUT AND UNIMPROVED ROADWAY AS THEY ARE SHOWN ON EXHIBIT 42 AND 43. EXHIBIT 43, WHICH IS THE 1973 USGS QUAD MAP, WAS USED AS THE BASIS FOR THE UNIMPROVED ROAD AND QUONSET HUT SHOWN ON THIS EXHIBIT. EXHIBIT 42 APPEARS TO SHOW THE UNIMPROVED ROADWAY AND QUONSET HUT IN THE SAME LOCATION AS EXHIBIT 43.

NORTHEAST 1/4
SECTION 24

R6W
R5W
SECTION 24
SECTION 19

GOV'T LOT 2



SOUTHEAST 1/4
SECTION 24

0204

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PROJECT NO.: WHITE
DESIGNED BY:
DRAWN BY: TJF
DWG NAME: WHITE-EX
DATE: 01-21-2010
SHEET NO: 1



**DESCRIPTION OF
EXHIBIT 'B'**

That portion of the Northeast quarter of Section 24, Township 50 North, Range 6 West, Kootenai County, Idaho, described as follows:

BEGINNING at a 3 inch Brass cap per corner perpetuation and filing record recorded as instrument number 1364874, records of Kootenai County, marking the East quarter corner of said section 24;

Thence North $89^{\circ}55'01''$ West along the south line of said Northeast quarter a distance of 116.57 feet;

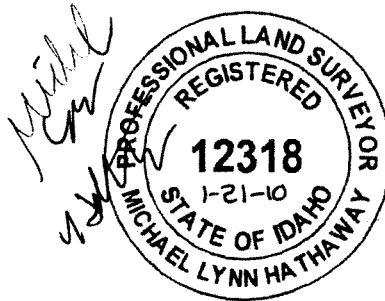
Thence North $50^{\circ}12'59''$ East a distance of 45.14 feet;

Thence South $87^{\circ}28'30''$ East a distance of 82.14 feet to a point on the East line of said Northeast quarter;

Thence South $00^{\circ}24'37''$ West along said East line a distance of 25.44 feet to the **POINT OF BEGINNING**.

CONTAINING: 2,731 square feet or 0.06 acres more or less.

Said description is intended to follow the unimproved roadway within section 24 as shown on the 1973 7.5 minute USGS Liberty Lake Quadrangle map.



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Attorneys for Defendant
Marti Mortensen

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

2010 MAR 30 AM 11:49

CLERK DISTRICT COURT
DEPUTY
Emil Chumpanker

THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L. AKERS,)
husband and wife,)
Plaintiffs,)

v.)
VERNON J. and MARTI MORTENSEN,)
Defendants,)

and)
D.L. WHITE CONSTRUCTION, INC., DAVID L.)
WHITE and MICHELLE V. WHITE,)
Defendants.)

Case No. CV-2002-222

DENNIS LYLE AKERS and SHERRIE L. AKERS,)
husband and wife,)
Plaintiffs,)

AFFIDAVIT OF MARTI
MORTENSEN

v.)
D.L. WHITE CONSTRUCTION, INC., DAVID L.)
WHITE and MICHELLE V. WHITE, husband and)
wife,)
Defendants,)

and)
VERNON J. MORTENSEN and MARTI E.)
MORTENSEN, husband and wife,)
Defendants.)

State of Washington)
 - s.s.
County of Spokane)

MARTI MORTENSEN COOK being first duly sworn deposes and says:

I was married to VERNON MORTENSEN. Our marriage was dissolved by order of the Court in Boundary County in 2006. The distribution of property was partially determined in late 2006, but distribution of other property and debts from our marriage is still pending in that Court.

During the time that VERNON MORTENSEN was working on the AKERS property I had no personal involvement with the matter. I was never on the scene and I never met the AKERS. I did not know that VERNON MORTENSEN had engaged in conduct that resulted in punitive damages being awarded, until the trial occurred and I learned about it from the trial.

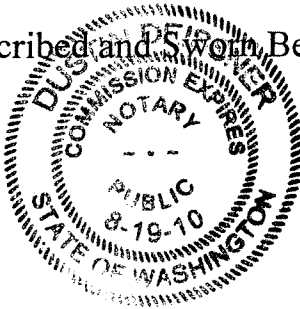
I never did anything to approve or authorize what VERNON MORTENSEN did in working on the AKERS property. To my knowledge our community estate did not benefit from what VERNON MORTENSEN did. To the extent that he was acting maliciously, there was no reason to do so that would or could have benefitted the community, and he was engaged on a frolic of his own. In the interim property settlement we entered, that property went to VERNON MORTENSEN. The property was never developed or sold and was eventually lost to tax foreclosure after being transferred to VERNON. I have never ratified his actions in any way.

Further affiant sayeth naught.

Marti Mortensen

Marti Mortensen

Subscribed and Sworn Before Me this 24 Day of March, 2010.



[Signature]
Notary Public residing in Spokane WA
My Commission Expires: 8/19/10

CERTIFICATE OF SERVICE

Dustin Deissner certifies:

I have on this date served the foregoing document upon the following parties by the following means:

TO:	BY:
VERNON J. MORTENSEN PO BOX 1922 BONNERS FERRY ID 83805	<input checked="" type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input type="checkbox"/> Facsimile to:
Robert Covington, 8884 N Government Way, Ste A Hayden, ID 83835	<input checked="" type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: 208-762-4546
Leander James Susan Weeks James, Vernon & Weeks, P. A. 1626 Lincoln Way Coeur d'Alene, ID 83814	<input checked="" type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: (208) 664-1684

Dated 3/24/2010

[Signature]

Dustin Deissner

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ISB# 5937

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:

2010 MAR 30 AM 11:49

CLERK DISTRICT COURT
Paul Crump
DEPUTY

Attorneys for Defendant
Marti Mortensen

THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI

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and

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wife,
Defendants,

and

VERNON J. MORTENSEN and MARTI E.
MORTENSEN, husband and wife,
Defendants.

Case No. CV-2002-222

MOTION FOR PARTIAL
SUMMARY JUDGMENT
RE: PUNITIVE
DAMAGES AGAINST
MARTI MORTENSEN

MOTION

MARTI MORTENSEN moves for partial summary judgment that she is not responsible either personally or as to her share of the community estate, for punitive damages assessed against VERNON MORTENSEN.

FACTS

This matter is on remand to determine damages, including possible punitive damages, due to actions by VERNON MORTENSEN where he allegedly did grading work outside the reasonable scope of an easement and acted aggressively towards Plaintiffs. This Court must determine the precise scope of the easement and decide if any punitive damages are proper. This motion seeks to determine as a matter of law that any punitive damages the Court does find, are personal to VERNON MORTENSEN and his half of the Community, and not to MARTI MORTENSEN.

ARGUMENT

It is undisputed in this case that any punitive damages that may be awarded against MORTENSENS will be based upon actions by VERNON MORTENSEN; MARTI MORTENSEN was not present and did not herself participate in any way in those actions.

1. Community is Liable for Intentional Torts of Spouse

As a general rule, community property of a spouse is subject to execution for intentional torts of the other spouse; but Idaho has not applied that rule to punitive

damages.

In *Hansen v. Blevins*, 84 Idaho 49, 367 P.2d 758 (1962), Blevins, who operated the community property bar, sprayed tear gas into the face of Hansen, a customer, who sued and recovered damages which he sought to satisfy from the wife's share of community assets. The court analyzed decisions from several other states and concluded,

It is not necessary to a decision in this case to determine whether community property is liable in all cases for the payment of obligations incurred by the tort of the husband. Here the record shows that the defendant committed the battery while he was actively and actually engaged in the management of the community business, **and that what he did was intended to be for the protection of community property and in the interest of the community business.** Under such circumstances the community is responsible for his acts. *McFadden v. Watson*, 51 Ariz. 110, 74 P.2d 1181; *McHenry v. Short*, 29 Wash.2d 263, 186 P.2d 900; 41 C.J.S. Husband and Wife § 523. [Emphasis added]

The *McFadden* decision cited by the Court explained,

It is not necessary, however, in order to bind the community, that the act which gives rise to the obligation, though tortious in its nature, shall actually benefit the community. It is sufficient that it was **committed by the spouse with the bona fide intention of protecting the interest of the community, and it makes no difference that the act was a mistake in judgment--** a tort so far as it affected the rights of other people and ultimately detrimental to the interest of the community. [Emphasis added]

McFadden v. Watson, 51 Ariz. 110, 113, 74 P.2d 1181 (1938). Similarly in *McHenry v. Short*, 29 Wash.2d 263, 186 P.2d 900 (1947) the husband was in the act of ejecting the victim from premises which the community claimed to own, so the husband was acting in pursuance of his management of community property or in the furtherance of

community business.

Then in *Hegg v. Internal Revenue Serv.*, 136 Idaho 61, 28 P.3d 1004 (2001)

the Supreme Court ruled,

We have not previously addressed the issue of whether the community is liable for all tort obligations, even those which might be characterized as separate, and because of the nature of the tort obligation in this case, it is not necessary for us to reach that issue here. . . . Community assets may be reached to satisfy a debt incurred by one spouse's fraud committed during marriage even if the other spouse is completely innocent of the fraud and has no personal liability where the fraud benefits the community or occurs during the spouse's management of the community.

2. Idaho has not Decided if a Community is Liable for Punitive Damages

The general rule set out in *Hansen* and *Hegg* applies to intentional torts, but not necessarily to punitive damages. Punitive damages require more than mere intent: they require willful **and malicious** conduct. Once a spouse engages in willfully malicious conduct, he is no longer seeking to benefit the community.

The justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that state be termed "malice, oppression, fraud or gross negligence"; "malice, oppression, wantonness"; or simply "deliberate or willful."

Manning v. Twin Falls Clinic & Hospital, Inc 122 Idaho 47, 830 P.2d 1185 (1991), quoting *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983).

The punitive damages award against MORTENSENS is based upon trespass and aggressive actions by VERNON MORTENSEN while trespassing. Similar conduct was

found to support punitive damages in *Cox v. Stolworthy*, 94 Idaho 683, 496 P.2d 682 (1972).

A. Punitive Damages Against Agent Not Automatically Imputed to Principal

Idaho may impose liability on a principal for intentional misconduct of an agent. *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 854 P.2d 280 (1993). But Idaho does *not* automatically impose *punitive* damages against a principal for the acts of an agent. *Manning v. Twin Falls Clinic & Hospital, Inc*, *supra*, held:

It is settled beyond dispute in Idaho that a principal is liable for punitive damages based on the acts of its agent only in circumstances in which the principal participated, or in which the principal authorized or ratified the agent's conduct. ... Furthermore, it is well established that punitive damages may not be assessed against a principal based upon the acts of an agent absent a clear showing of authorization or ratification.

Griff, Inc. v. Curry Bean Co., 138 Idaho 315, 322, 63 P.3d 441, 448 (2003) interpreted *Manning* to require that:

To recover punitive damages against a corporation, one must show that an officer or director participated in, or ratified, the conduct underlying the punitive damage award.

Accord: *Vendelin v. Costco Wholesale Corp* 140 Idaho 416 95 P.3d 34 (2004).

B. Punitive Damages are not Automatically imputed to a Codefendant

Verheyen v. Dewey, 27 Idaho 1, 146 P. 1116 (1915) held that even if one defendant was prompted by malicious motives in the acts that he did, the other defendant cannot be made liable on account of the malicious motives of his codefendant

unless his codefendant is implicated in such malice.

C. Purpose of Punitive Damages is Deterrence

Finally we note that the primary purpose for punitive damages is deterrence of similar conduct. *Linscott v. Rainier National Life Insurance Co*, 100 Idaho 854, 606 P.2d 958 (1980).

3. In This Case Punitives Should not Apply to MARTI MORTENSEN

Punitive damages were awarded against VERNON MORTENSEN due to his intentional, malicious actions in trespassing on AKERS' property without knowing there was an easement. This Court may decide to reimpose punitives once the exact easement is determined.

MARTI MORTENSEN did not participate or even know about the actions of VERNON MORTENSEN, did not authorize or ratify his actions, and has since divorced VERNON (although the divorce is not complete as to property distribution).

However, the various policies embodied in the case law strongly argue that a Community should not be responsible for a spouse's conduct that supports punitive damages.

- Idaho cases making the Community liable for intentional torts are based upon agency principles, that the wrongdoer spouse was acting to benefit or protect the community.
- The punitive damages cases require the wrongdoer to go beyond mere intent, and

to have acted with specific malice.

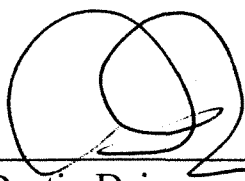
- Idaho recognizes that malice does not impute to the principal, even though intent may be imputed, unless the principal participates, authorizes or ratifies the malicious conduct.
- The purpose of punitive damages, deterrence, is not served by charging an innocent spouse with her husband's wrongdoing.
- Finally in this case, the marital community has, since the time of the incident, been terminated.

Based on this analysis, the court should conclude that a marital community – or more precisely, the other spouse's half of the marital community – is not liable for punitive damages asserted against one spouse, and no judgment should enter against the innocent spouse individually or jointly.

CONCLUSION

This Court should rule as a matter of law that any punitive damages assessed against VERNON MORTENSEN are not jointly and severally imputed to MARTI MORTENSEN.

March 9, 2010


Dustin Deissner


CERTIFICATE OF SERVICE

Dustin Deissner certifies:

I have on this date served the foregoing document upon the following parties by the following means:

TO:	BY:
VERNON J. MORTENSEN PO BOX 1922 BONNERS FERRY ID 83805	<input checked="" type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input type="checkbox"/> Facsimile to:
Robert Covington, 8884 N Government Way, Ste A Hayden, ID 83835	<input type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: 208-762-4546
Leander James Susan Weeks James, Vernon & Weeks, P. A. 1626 Lincoln Way Coeur d'Alene, ID 83814	<input checked="" type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input type="checkbox"/> Facsimile to: (208) 664-1684

Dated 3/29/10



Dustin Deissner

SUSAN P. WEEKS
JAMES, VERNON & WEEKS, P.A.
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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: #1687

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CLERK DISTRICT COURT

Timothy J. Lawrence
DEPUTY

Attorneys for Plaintiffs

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DENNIS LYLE AKERS and SHERRIE L.
AKERS, husband and wife,

Plaintiffs

vs.

D.L. WHITE CONTRUCTION, INC.; DAVID
L. WHITE and MICHELLE V. WHITE,
husband and wife; and VERNON J.
MORTENSEN and MARTI E. MORTENSEN,
husband and wife,

Defendants.

Case No. CV-02-222

MEMORANDUM IN SUPPORT
OF MOTION TO STRIKE MARTI
MORTENSEN'S MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

In *Akers v. Mortensen*, 147 Idaho 39, 205 P.3d 1175 (Idaho 2009), the Idaho Supreme Court remanded this matter to the trial court. Prior to remand, the Supreme Court vacated the trial court's award of damages due to reversal of the trial court's determination of the location of the easement across parcel B. In its directives on remand, the Idaho Supreme Court directed the trial court to:

(1) Determine the location of Appellants' prescriptive easement on Parcel B; and

(2) After determining the location of the easement, determine if the Plaintiffs were entitled to a reinstatement of any of the trespass damages, reinstatements of Sherry Akers's award of damages for emotional distress; or reinstatement of the award of punitive damages given the revised location of the prescriptive easement.

The case was remanded for further proceedings consistent with the substituted opinion. In the remittitur issued in this matter, the trial court was ordered to comply with the directives of the substituted opinion.

On remand, for the first time, Marti Mortensen raises the issue of whether she is responsible either personally or as to her share of the community estate for punitive damages assessed against Vernon J. Mortensen.

II. ARGUMENT

Without addressing the merits of Marti Mortensen's motion, Plaintiffs move to strike the motion for summary judgment on the grounds that it is not within the scope of the remand. In *Mountainview Landowners Co-op. Ass'n, Inc. v. Cool*, 142 Idaho 861, 205 P.3d 1175 (2006) (*Mountainview II*), the Supreme Court discussed the actions a trial court could take on remand. This case involved the interpretation of a Use Agreement concerning the use of a private beach for swimming. The trial court had given a broad interpretation to the swimming easement granted to beach users which the appellate court found to be too broad. On remand, the trial court was directed to define the swimming easement in a more limited fashion.

After remand, the beach owner argued that the swimming easement did not include a right to use the beach as a trail to the swimming area on the beach (an ingress/egress easement). The trial court noted that this issue had not been raised until

after the first remand and was not in the scope of the remand. (The case went up on appeal twice.)

The beach owner contended the trial court committed error by not addressing this issue following remand. The beach owner contended that although the issue was not raised in the first appeal with specificity, the matter of whether Association members could traverse the beach came within the broader issue of the scope of the easement, which, in turn, depended on the definition of "swimming" that was the subject of remand. The Supreme Court affirmed the trial court's decision and rejected this argument. In addressing this issue, the Supreme Court observed:

"Issues not raised below but raised for the first time on appeal will not be considered or reviewed." *Whitted v. Canyon County Bd. of Comm'rs*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002). However, "[t]he general rule is that, on remand, a trial court has authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court." *State v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000).

In her motion, Marti Mortensen raised the issue of whether the community can be liable for punitive damages for willful and malicious acts of the spouse. She urges that the trial court should hold on remand that an innocent spouse's half of the marital community is not liable for punitive damages asserted against one spouse.

The only method by which Marti Mortensen can seek an opinion on this issue on remand is to establish it is within the scope of the remand. The issue of Marti Mortensen's liability either personally, or her share of the community assets, for any punitive damages arising from conduct of Vernon Mortensen was not addressed in the first appeal. In fact, it was never raised to the trial court. The trial court was not

specifically directed to take action on this issue. Thus, Marti Mortensen may only raise this issue on remand if it is subsidiary to the actions directed by the appellate court.

This issue is not subsidiary to the issues remanded to the trial court by the Supreme Court. It is unrelated to the location of the easement. Further, even though it touches on the issue of punitive damages, it is unrelated to whether these damages should be *reinstated* following determination of the location of the easement. It is not subsidiary to the question whether the revised location of the prescriptive easement on Parcel B changes the analysis of the *amount* of damages to which Plaintiff may be entitled. Therefore, the summary judgment motion should be stricken.

DATED this 17th day of May, 2009.

JAMES, VERNON & WEEKS, P.A.

By Susan P. Weeks
Susan P. Weeks
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of April, 2010 a true and correct copy of the foregoing document was served upon the following individuals:

Robert E. Covington 8884 N. Government Way, #A Hayden, ID 83835		Vernon J. Mortensen P.O. Box 330 Naples, ID 83847		Dustin Deissner Van Camp & Deissner 1707 W. Broadway Ave. Spokane, WA 99201	
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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

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2010 APR 27 AM 10:08

CLERK DISTRICT COURT
DEPUTY
[Signature]

Attorneys for Plaintiff
Marti Mortensen

THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L. AKERS,
husband and wife,
Plaintiffs,

v.
VERNON J. MORTENSEN and MARTI E.
MORTENSEN, husband and wife,
Defendants,

and
D.L. WHITE CONSTRUCTION, INC., DAVID L.
WHITE and MICHELLE V. WHITE, husband and
wife,
Defendants.

Case No. CV-2002-222

DENNIS LYLE AKERS and SHERRIE L. AKERS,
husband and wife,
Plaintiffs,

RESPONSE TO MOTION
TO STRIKE

v.
D.L. WHITE CONSTRUCTION, INC., DAVID L.
WHITE and MICHELLE V. WHITE, husband and
wife,
Defendants,

and
VERNON J. MORTENSEN and MARTI E.
MORTENSEN, husband and wife,
Defendants.

Plaintiffs argue that the issues raised by MARTI MORTENSEN as to the applicability of punitive damages to her as a divorced spouse, are outside the scope of the remand. MARTI MORTENSEN submits the issue is subsidiary to the remand and could not have been raised in the original trial as it was then not ripe.

1. Scope of Remand

This Court may determine whether punitive damages should apply jointly and severally to MARTI MORTENSEN. In *Mountainview Landowners Co-op. Ass'n, Inc. v. Cool*, 142 Idaho 861, 136 P.3d 332 (Idaho 2006) the Court held that:

"Issues not raised below but raised for the first time on appeal will not be considered or reviewed." However, "[t]he general rule is that, on remand, a trial court has authority to take actions it is specifically directed to take **those which are subsidiary to the actions directed by the appellate court**."

State v. Hosey, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000) involved a remand in a criminal case due to a suppression issue; the District Court permitted Hosey to withdraw his guilty plea on remand. The Court stated,

There is no question that had we reversed the denial of the motion to suppress, yet remained silent about the withdrawal of the plea, the trial court would have had jurisdiction to allow Hosey to withdraw the guilty plea, if such an action complied with the terms of the plea agreement, because the withdrawal of the plea would clearly be a subsidiary action to the Court's reversal of the denial of the motion to suppress. This case is no different. Hosey's motion to withdraw his plea was within the trial court's jurisdiction on remand because ruling on the effect of an appellate court's decision under the terms of a plea agreement is necessarily subsidiary to any other directive on remand where a defendant has entered a conditional guilty plea.

Akers v. Mortensen, 147 Idaho 39, 205 P.3d 1175, 1183 (2009) specifically included the

issue of joint and several liability in its remand:

The district court awarded Sherrie Akers \$10,000 for negligent infliction of emotional distress, **for which Appellants are jointly and severally liable**. To support a claim for negligent infliction of emotional distress, a party must prove a breach of a recognized legal duty. *Nation v. State*, Dept. of Corr., 144 Idaho 177, 191, 158 P.3d 953, 967 (2007). In the instant case, the district court predicated the award of damages for negligent infliction of emotional distress on Appellants' malicious behavior while trespassing on the Akers' property. As we indicated in *Akers I*, the question of damages flowing from Appellants' conduct is inseparable from consideration of Appellants' easement rights. *Akers I*, 142 Idaho at 304, 127 P.3d at 207. Without a determination of Appellants' easement rights, it is impossible to determine the scope of Appellants' trespass. **Therefore, we vacate the district court's award of damages for negligent infliction of emotional distress and remand the issue for further determination after the district court determines Appellants' easement rights. For the same reason, we vacate the district court's award of punitive damages in favor of the Akers.**

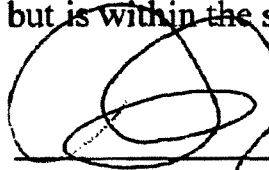
MARTI MORTENSEN'S assertion of the issue of Community liability for punitive damages due to her husband's actions, is logically subsidiary to the determination of whether punitive damages apply at all. More simply, the entire issue of damages was put back on the table by the Supreme Court; this Court may consider whatever aspects thereof it chooses.

2. New Events

The original damages award was back in 2004; the MORTENSENS' divorce, which gave rise to this issue, did not occur until 2006. Hence the issue of whether punitive damages should apply to a divorced spouse was not ripe at the time of the original trial since the facts giving rise had not occurred yet. E.g., *Bell Rapids Mut. Irrigation Co. v. Hausner*, 126 Idaho 752, 754, 890 P.2d 338, 340 (1995).

MARTI MORTENSEN submits that the issue of punitive damages applying to her could not have been raised at the first trial, but is within the scope of the current remand.

April 26, 2010


Dustin Deissner WSB# 10784

CERTIFICATE OF SERVICE

Dustin Deissner certifies:

I have on this date served the foregoing document upon the following parties by the following means:

TO:	BY:
VERNON J. MORTENSEN PO BOX 1922 BONNERS FERRY ID 83805	<input checked="" type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input type="checkbox"/> Facsimile to:
Robert Covington, 8884 N Government Way, Ste A Hayden, ID 83835	<input checked="" type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: 208-762-4546
Leander James Susan Weeks James, Vernon & Weeks, P. A. 1626 Lincoln Way Coeur d'Alene, ID 83814	<input checked="" type="checkbox"/> US Mail 1 st Class Postage Prepaid <input type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: (208) 664-1684

Dated 4/26/10


Dustin Deissner

FILED 5/3/10

AT 10:15 O'Clock A M

CLERK OF DISTRICT COURT

Donna Clausen
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L.)
AKERS, husband and wife,,)

Plaintiffs,)

vs.)

D.L. WHITE CONST., INC., DAVID L.)
WHITE and MICHELLE WHITE, husband)
and wife, and VERNON J. MORTENSEN)
and MARTI E. MORTENSEN, husband and)
wife,)

Defendants.)

Case No. **CV 2002 222**

**MEMORANDUM DECISION AND
ORDER GRANTING PLAINTIFFS'
MOTION TO STRIKE DEFENDANT
MARTI MORTENSEN'S MOTION
FOR SUMMARY JUDGMENT**

I. ANALYSIS.

This matter is before the Court on remand from the Idaho Supreme Court for fact-finding only on the location of the prescriptive easement. This remand follows the second appeal on this case to the Idaho Supreme Court.

On October 8, 2009, this Court held a status conference and all parties requested the opportunity to present briefing on the issue of which party carries the burden of proof with regard to the prescriptive easement issue on remand from the Supreme Court. The Court granted this request. At present, the only issues remaining are: (1) the location of the prescriptive easement and (2) any award, if appropriate, of damages and attorney fees. Each party has submitted briefing. This matter has been

set for hearing on remand on May 27, 2010.

On March 30, 2010, defendant Marti Mortensen filed a Motion for Partial Summary Judgment, asking the Court to rule she is not liable for any portion, jointly or severally, of any possible award of punitive damages awarded to plaintiffs against Vernon Mortensen. Marti Mortensen's Motion for Partial Summary Judgment is also set for oral argument on May 27, 2010.

On April 14, 2010, plaintiffs filed their Memorandum in Support of Motion to Strike Marti Mortensen's Motion for [Partial] Summary Judgment and Notice of Hearing on the Motion to Strike. No Motion to Strike itself was ever filed. Oral argument on plaintiffs' Motion to Strike Marti Mortensen's Motion for Summary Judgment was held on April 28, 2010.

In the plaintiffs' Memorandum in Support of Motion to Strike Marti Mortensen's Motion for [Partial] Summary Judgment, plaintiffs argue Marti Mortensen's Motion for Summary Judgment is improper because it is not in the scope of the remand. Memorandum in Support of Motion to Strike, p. 2, citing *Mountain view Landowners Co-op Ass'n, v. Cool*, 142 Idaho 861, 205 P.3d 1175 (2006) (*Mountainview II*). Plaintiffs argue the Supreme Court in *Mountainview II*, specifically held a court has the power on remand only to take actions it was directed to take or action subsidiary to those it was directed to take. *Id.*, p. 3. Because Marti Mortensen did not raise the issue of her liability for possible punitive damages in the first appeal, this Court is now without authority to address the matter. *Id.* Plaintiffs argue the question of her liability for punitive damages is not subsidiary to the only issue remaining on remand, the question of the location of the easement. *Id.*, p. 4. Plaintiffs assert:

Further, even though it touches on the issue of punitive damages, [the question of Marti Mortensen's liability for punitive damages] is unrelated to

whether these damages should be *reinstated* following determination of the location of the easement. It is not subsidiary to the question whether the revised location of the prescriptive easement on Parcel B changes the analysis of the *amount* of damages to which Plaintiff may be entitled.

Id., p. 4.

As cited by plaintiffs, *Mountainview II* deals with the Supreme Court remanding for a determination of the scope of the term “swimming.” In *Mountainview I*, the Supreme Court had “signaled” that a strict definition of “swimming”, so as to prevent parents from using the beach area to lifeguard their children, was “illogical.” *Dr. James Cool v. Mountainview Landowners Co-op Ass’n*, 139 Idaho 770, 773, 86 P.3d 484, 487 (2004) (*Mountainview I*). The Cools appealed and in *Mountainview II*, the Supreme Court disagreed with the Cools’ contention that the Supreme Court had not intended to direct the District Court to find “lifeguarding” to be a permissible activity under the use agreement. *Moutnainview II*, 142 Idaho 861, 865, 136 P.3d 332, 336. The District Court had been instructed to define “swimming” in accordance with the Supreme Court’s opinion in *Mountainview I*, and the Court determined in *Mountainview II* that inclusion of “lifeguarding” in the scope of the use agreement was not error and was, in fact, mandated by its opinion in *Mountainview II*. 142 Idaho 861, 865, 136 P.3d 332, 336. In *Mountainview II*, the Cools also argued Association use of their beach to access the adjacent public beach did not involve “swimming” within the meaning of the use agreement; the Association replied this matter was being improperly raised for the first time by Cools on appeal. 142 Idaho 861, 865-66, 136 P.3d 332, 336-37. The Supreme Court then quoted from *State v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000): “[t]he general rule is that, on remand, a trial court has the authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court.” The Supreme Court held Association use of the Cool’s

beach as a pathway to a public beach did not present a subsidiary question to the definition of "swimming." *Id.*

Here, the Supreme Court's decision in *Akers II* included holding the District Court's findings of fact regarding the scope and location of the prescriptive easement were not supported by substantial and competent evidence. *Akers v. Mortensen*, 147 Idaho 39, 47, 205 P.3d 1175, 1183 (2009) (*Akers II*). In this respect, the Supreme Court found: (1) no error by this Court as to its finding that the location of Appellant's prescriptive easements across the Akers property was coextensive with the express easement in Government Lot 2; and (2) no error by this Court as to its finding that the scope of the prescriptive easement across the Akers' property was limited to a width of 12.2 feet. 147 Idaho 39, 47-48, 205 P.3d 1175, 1183-84. However, the Supreme Court held it was error for this Court to find Appellant's prescriptive easement turned immediately south upon entering Parcel B. *Id.*

However, the photograph does not support a finding that the access road previously turned 90 degrees to the south traveling straight up a steep hill in order to access Parcel A, as would be required if the access road had immediately turned 90 degrees upon entering Parcel B. In light of this photographic evidence, we conclude that there is not substantial evidence supporting the district court's conclusion as to the location of Appellant's prescriptive easement on Parcel B. This issue must be remanded to the district court for additional fact finding consistent with this opinion

147 Idaho 39, 47-48, 205 P.3d 1175, 1183-84.

[T]he question of whether and to what degree Appellant's conduct constituted trespass on the Akers' property is intertwined with the question of the scope and boundaries of Appellants' easement rights. Because the district court must determine the location of appellants' easement in Parcel B on remand, we vacate the district court's award of damages below based on trespass.

* * *

Without a determination of Appellant's easement right, it is impossible to determine the scope of Appellants' trespass. Therefore, we vacate the district court's award of damages for negligent infliction of emotional distress and remand the issue for further determination after the district

court determined Appellant's easement rights. For the same reason, we vacate the district court's award of punitive damages in favor of Akers.

147 Idaho 39, 48, 20 P.3d 1175, 1184.

The first issue on remand, which this Court clearly has authority to take action upon, is the *location* of the prescriptive easement. The location of that easement is key in determining the "scope of Appellant's trespass", which is a subsidiary issue to the location of the easement, and an issue specifically called out by the Idaho Supreme Court to be addressed on remand by this Court. "[A]fter the district court determine[s] Appellant's easement rights", the district court must determine "damages for negligent infliction of emotional distress", if any. That is another issue subsidiary to the location of the prescriptive easement, but also, an issue specifically called out by the Idaho Supreme Court to be addressed on remand by this Court.

Since the original trial in this matter, Marti Mortensen and Vernon Mortensen have divorced in 2006. Response to Motion to Strike, p. 3. Accordingly, Marti Mortensen argues the issue as to whether punitive damages should apply to her "...was not ripe at the time of the original trial since the facts giving rise had not occurred yet." *Id.* As far as any trespass of plaintiffs' land was concerned, Marti Mortensen claims she had no involvement. Motion for Summary Judgment, p. 2. Marti Mortensen's summary judgment asks this Court to decide as a matter of law whether on remand she can be liable for any portion, jointly or severally, of any possible award of punitive damages awarded to plaintiffs against Vernon Mortensen. *Id.*, pp. 2-7.

As stated in *Hosey*, "[t]he general rule is that, on remand, a trial court has the authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court." Subsidiary means: "subordinate; under

another's control." Black's Law Dictionary, 7th Ed., p. 1443 (1999). That definition focuses on subsidiary corporations. The more common meaning is: "of secondary importance." Webster's Ninth New Collegiate Dictionary, p. 1176 (1983).

Clearly, a subsidiary issue to the location of the easement on remand would be a determination of any award to attorney fees and costs to the prevailing party, depending on the scope and boundaries of the easement as determined on remand. Whether the issue raised in Marti Mortensen's Motion for Partial Summary Judgment is a subsidiary issue on remand, is not very clear.

This Court appreciates the arguments made by both plaintiffs and by defendant Marti Mortensen. This Court can see reasons why Marti Mortensen's liability (or not) as to punitive damages, may be a subsidiary issue, considering *Hosey* and *Mountainview II*, and why it may not be a subsidiary issue. What is clear is that the Idaho Supreme Court has shown in *Mountainview II*, that it is certainly willing to reverse a trial court were it to consider an issue on remand that in fact was not a subsidiary issue. The present case certainly needs no more appeals. This Court feels its discretion is best used in granting plaintiffs' Motion to Strike.

This is not to say that *after* the Court's decision on the location of the easement, and *after* determination of punitive damages, if any, Marti Mortensen cannot renew her motion for summary judgment or make some other dispositive motion to have this Court consider her argument that she should not be liable for punitive damages, if awarded. It is only fair to allow Marti Mortensen be heard on this legal argument, albeit at a later time.

This makes best use of the Court's resources. If there are no punitive damages awarded on remand, the Marti Mortensen's motion for summary judgment need not be

heard.

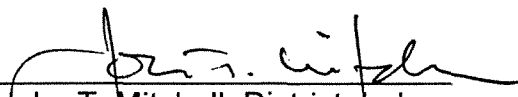
This decision is also fair to Marti Mortensen, as she is given her opportunity to defend against punitive damages from a factual standpoint (in the first instance during the issues to be decided on remand), and, if need be, if punitive damages are awarded, she has opportunity at a later point in time to defend against punitive damages from a legal standpoint. As a practical matter, were this Court to consider Marti Mortensen's Motion for Summary Judgment, and grant such at present, Marti Mortensen would still be involved in seeing this case through to the end of the litigation. Marti Mortensen's motion is a Motion for *Partial* Summary Judgment. Counsel for Marti Mortensen recognizes that community property of a spouse is subject to execution for intentional torts of the other spouse." Motion for Partial Summary Judgment, p. 2.

II. CONCLUSION AND ORDER.

For the reasons set forth above, plaintiff's Motion to Strike Marti Mortensen's Motion for [Partial] Summary Judgment will be granted.

IT IS HEREBY ORDERED plaintiff's Motion to Strike Marti Mortensen's Motion for [Partial] Summary Judgment is GRANTED. If need be, defendant Marti Mortensen will be allowed to raise the legal arguments contained in her Motion for Partial Summary Judgment at a later time.

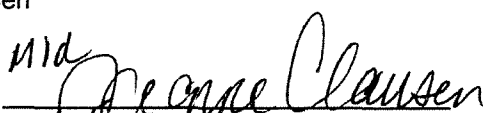
Entered this 3rd day of May, 2010.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 3 day of May, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Party Pro Se</u>
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Jeanne Clausen, Deputy Clerk